TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. ~~950~~. 494

C. S. WIGHT, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FILED APRIL 18, 1896.

(16,260.)

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No. 970.

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THE UNITED STATES.

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1 *Docket Entries.*

October Term, 1894.

Hall.	UNITED STATES	
Johns McCleave.	*vs.*	18.
Hugh L. Bond.	C. S. WIGHT and R. M. FRASER.	

Allegheny.

Indictment, agent of common carrier transporting freight for less than the legal rate. October 18, 1894, a true bill; October 19, 1894, continued to May term, 1895; October 20, 1894, recognizance of C. S. Wight for said term taken and filed; May 13, 1895, on precipe filed, subpœna issued; May 13, 1895, defendant C. S. Wight pleads "*non cul et de hoc*," &c., U. S. attorney similiter, issue, and a jury, being called, came, viz., Benjamin Whitman, James K. Winterbottom, William E. Dales, M. E. Sanders, D. J. Sweet, A. J. Jacobs, Canfield Stone, Peter A. Evans, Lindsay Hanes, Henry Frazier, John P. Douglass, and F. E. Shaffer, twelve good and lawful men of the western district of Pennsylvania, who, having been duly summoned, returned, and empaneled, were sworn to try the issue herein joined; May 14, 1895, trial proceeds; same day, United States points, with ruling of the court thereon, filed; same day, defendant's points, with ruling of court thereon, filed; May 15, 1895, the jury on their oaths aforesaid respectively do say *the* the defendant C. S. Wight is guilty in manner and form as he stands indicted, and so they all say; May 18, 1895, motion and reasons for new trial allowed to be filed; June 5th, 1895, argument on said motion, *C. A. V.;* October 7, 1895, testimony, charge of court, exceptions of defendant, and opinion of the court refusing the motion for a new trial filed; November 5, 1895, U. S. attorney moves for judgment; whereupon "the sentence of the court is that you pay a fine to the United States of one thousand dollars; that you pay the costs of this prosecution and stand committed until this sentence be complied with;" same day, commitment issued; November 21st, 1895, petition for writ of error and assignments of error filed, and order made allowing same, defendant to give bail during pendency of cause in sum of one thousand dollars; same day, citation, with acceptance of service by U. S. attorney, filed; December 19, 1895, order made extending time of the taking of the appeal thirty days from date hereof; Jan. 16, 1896, recognizance of C. S. Wight, one of said defendants, for appearance when notified to appear taken in open court and approved and filed; January 21, 1896, order made extending the time for filing tran-

Witnesses.
U. S.
F. H. Bruening.
J. G. Weible.
Henry Wolf.
Stewart Munn.
C. A. Chambers.
James T. Leal.
James Means.
J. V. Patton.
A. J. Anderson.

Def't-'.
Stewart Munn.
C. S. Wight.
W. A. Edeburn.
Henry B. Rea.

2

script thirty days from date hereof; February 19, 1896, defendant's bill of exceptions filed; February 20, 1896, order made extending the time for filing the transcript thirty days from the date hereof; March 19th, 1896, order made extending the time for filing the transcript surappeal thirty days from date hereof.

3 WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

In the District Court of the United States for the Western District of Pennsylvania, of October Sessions, A. D. 1894.

The grand inquest of the United States of America now inquiring in and for the western district of Pennsylvania upon their oaths and solemn affirmations respectively do present that heretofore, to wit, on the twenty-seventh day of July, in the year of our Lord one thousand eight hundred and ninety-two, the Baltimore & Ohio Southwestern Railroad Company and the Baltimore & Ohio Railroad Company were each a corporation and a common carrier and were then engaged in the transportation of property wholly by railroad, under a common agreement or arrangement with each other for a continuous carriage and shipment of property over a continuous line and route operated by them, from one State of the United States to another State of the United States, and particularly were said corporations and common carriers then so engaged in such carriage and shipment of property from the city of Cincinnati, in the State of Ohio, thence, passing through the States of Ohio and Pennsylvania, to the city of Pittsburgh, in the State of Pennsylvania, and had theretofore established joint tariffs or rates and charges, which were then in force, for such transportation over said continuous line and route of the following property, to wit, beer in car-load lots, at the rate of fifteen cents per hundred pounds, and had filed a copy thereof as a schedule of rates and charges with the Interstate Commerce Commission, and the rates and charges so established and fixed by the common agreement or arrangement of said
4 corporations and common carriers and by the filing of said tariffs with the said Interstate Commerce Commission for the transportation of the property aforesaid over the line and route aforesaid was the sum of fifteen cents per hundred pounds in car-load lots and was the only lawful rate and charge which the said corporations and common carriers or any of them or any person employed by or acting for them or any of them could lawfully charge, demand, collect, or receive from any person or persons for the transportation of the property aforesaid over the line and route aforesaid.

And C. S. Wight and R. M. Fraser were then, to wit, on the twenty-seventh day of July, in the year of our Lord one thousand eight hundred and ninety-two, in the district aforesaid and within the jurisdiction of this court, the agents of and persons acting for and employed by said corporations and common carriers, and as such agents of and persons acting for and employed by said corporations and common carriers, well knowing that the rate and charge

for the transportation of said property over the line and route aforesaid was then and there the sum of fifteen cents per hundred pounds in car-load lots and not otherwise, did then and there, unlawfully, knowingly, wilfully, feloniously, directly and indirectly, by special rate, rebate, drawback, and other device, charge, demand, collect, and receive from, and did then and there, unlawfully, knowingly, wilfully, feloniously, directly and indirectly, cause to be charged, demanded, collected, and received from, and did then and there, unlawfully, knowingly, wilfully, feloniously, directly and indirectly, suffer and permit to be charged to, demanded, collected, and received from, F. H. Bruening a less compensation than said sum of fifteen cents per hundredweight in car-load lots so established and fixed as a lawful rate and charge for the transportation of said property over the line and route aforesaid, as was then specified in the
5 schedule containing a copy of said tariff filed with the Interstate Commerce Commission aforesaid and then in force, to wit, by then and there charging the said F. H. Breuning the sum of eleven and one-half cents per hundredweight for beer in car-load lots, which was then and there transport*ated* from Cincinnati, Ohio, aforesaid to Pittsburgh, Pennsylvania, aforesaid by a continuous carriage or shipment by said corporations and common carriers first named and over said continuous line and route for the said F. H. Breuning under the said agreement and arrangement then and there existing between said corporations and common carriers providing for such continuous carriage and shipment from Cincinnati, Ohio, to Pittsburgh, Pennsylvania, as aforesaid, and which said sum of eleven and one-half cents per hundredweight, so charged, demanded, collected, and received for the transportation of said property as aforesaid from F. H. Breuning as aforesaid, was then and there a less compensation for the service rendered to the said F. H. Breuning in the transportation of said property as aforesaid than was charged to, demanded, collected, and received from Henry Wolf for doing for him a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, and the said C. S. Wight and R. M. Fraser were then and there in manner and form aforesaid unlawfully, knowingly, wilfully, directly, indirectly, and feloniously guilty of unlawful discrimination in favor of the said F. H. Breuning and against Henry Wolf, contrary to the form of the act of Congress in such case made and provided and against the peace and dign*a*ty of the said United States.

HARRY ALVAN HALL,
United States Attorney for the Western Dist. of Penna.

6 Endorsements on indictment: Witnesses, 1, Henry Wolf; 2, Rob't Reinhold; 3, F. H. Breuning; 4, James T. Leal; 5, John T. Marchand. Sworn 18th day of October, 1894, by me, W. G. Heiner, foreman. October 18th, 1894. A true bill. W. G. Heiner, foreman. No. 18. Oct. term, 1894. Criminal docket. United States district court, western dist. of Pa. United States *vs.* C. S. Wight, R. M. Fraser. Indictment. Unlawful discrimination

in freight. And now, May 13, 1895, the defendant C. S. Wight pleads not guilty. Hugh L. Bond, Johns McCleave, att'ys for def't C. S. Wight. Filed October 18, 1894. Harry Alvan Hall, U. S. att'y.

7 In the District Court of the United States for the Western District of Pennsylvania.

UNITED STATES
vs.
C. S. WIGHT *et al.* } No. —, — Docket.

William T. Lindsey, clerk of said court:

Issue subpœna in the above-stated case for the following-named witnesses on the part of the United States, to wit, T. W. Gallaher, division freight agent B. & O. R. R., city; J. V. Patton, sup't P. & W. R. R., returnable at the city of P'gh, in said district, forthwith.

G. W. WURZELL,
Ass't U. S. Attorney.

Pittsburgh, May 13, 1895.

8 [Endorsed:] No. 18. October term, 1894. Criminal docket. United States district court, western district of Pennsylvania. United States *vs.* C. S. Wight *et al.* Precipe for subpœna. Filed May 13, 1895. Hall, U. S. attorney.

9 *Names of Jurors.*

1. Benjamin Whitman.
2. James K. Winterbottom.
3. William E. Dales.
4. M. E. Sanders.
5. D. J. Sweet.
6. A. J. Jacobs.
7. Canfield Stone.
8. Peter A. Evans.
9. Lindsey Hanes.
10. Henry Frazier.
11. John P. Douglass.
12. F. E. Shaffer.

Witnesses.

U. S.

1. F. H. Breuning.
2. J. G. Weible.
3. Henry Wolf.
4. Stewart Munn.
5. C. A. Chambers.
6. James T. Leal.
7. James Means.
8. J. V. Patton.
9. A. J. Anderson.

Def't-'.

1. Stewart Munn.
2. C. S. Wight.
3. W. A. Edeburn.
4. Henry B. Rea.

10 Endorsement: No. 18. May term, 1895. Crim. docket. United States district court, west. dist. of Penna. United States *vs.* C. S. Wight. Jury. Filed May 13, 1895.

11 *Plaintiff's Points.*

The court is respectfully requested to charge the jury as follows:

First. If the jury believe from the evidence that the railroad companies carried beer in car-load lots, both for Bruening and Wolff, at the same time, between the same terminal points and over precisely the same route, this would be a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

Second. If the jury believe from the evidence that, such service having been rendered and the beer having reached its terminal point, the railroad company furnished free cartage or repaid the cost of cartage to Bruening and did not furnish free cartage or repay the cost thereof to Wolff, this would be an unjust discrimination; and if the jury find from the evidence that C. S. Wight aided and abetted therein or suffered or permitted the same to be done, the verdict should be guilty.

Third. That the fact that Bruening had a siding from a competing railroad and Wolff had no such siding cannot be considered with reference to the guilt or innocence of the defendant in this case.

12 *Exceptions of Defendant.*

The defendant excepts, by his counsel, to the following portion of the charge of the court to the jury, viz:

1. "So that, gentlemen, you see the issue in this case narrows down to the fact was there a like and contemporaneous—that is, a service at the same time performed for these two men in the transportation of a like kind of traffic, and was it under substantially similar circumstances and conditions."

And at his request the court notes an exception thereto May 15th, 1895.

JOS. BUFFINGTON, *D. J.* [SEAL.]

The defendant excepts, by his counsel, to the following portion of the charge of the court to the jury, viz:

2. "The purpose of the second section of the interstate-commerce law, gentlemen, was to afford to all shippers who applied for transportation of like character of freight by the railroad company, under similar circumstances and conditions that they should all of that class receive a uniform rate, that there should be no discrimination between them. The franchises or powers of a railroad as common carriers empower them to transfer this freight from their terminal station at Cincinnati to their terminal station at Pittsburgh. That was all they could legally be called upon to do. If a shipper in

Cincinnati desired a railroad company to go to his place of business and put his freight in drays and carry it to a terminal station, that was a matter which the railroad company as a common carrier was not bound to do. It could do it if it saw fit, but it was a
13 matter of grace and not of right on the part of the shipper, so when the freight was brought to the other terminal the railroad company would have a right, if it saw fit, to deliver the freight in carts or wagons, but that was a matter which it was not called upon as a common carrier to do as a matter of right. For ordinary purposes the terminals of these roads was the limit of their duty, so far as the transportation was concerned, of their duty as common carrier, unless they saw fit to accept a further duty in the way of delivering the goods off the line of their road. I mean unless they saw fit to undertake the delivery of the goods by way of carts or wagons."

And at his request the court notes an exception thereto.

JOS. BUFFINGTON, *D. J.* [SEAL.]

3. The defendant excepts, by his counsel, to the following portion of the charge of the court to the jury, viz:

"In this connection we may say, gentlemen, that the question has been raised here that the beer which was shipped to Mr. Wolf was in a different condition from that shipped to Mr. Bruening. The bills of lading have been given in evidence in regard to the Wolf shipment, and it seems by them that the beer was shipped by the Kaufman Brewing Company to the care of Henry Wolf at Pittsburgh, and to the bills of lading a draft was attached. Those drafts came to the same bank here, the German National
14 Bank of Pittsburgh, and Mr. Wolf then paid the draft, took the bill of lading down to the B. & O. R. R. station, and received the beer there.

We have been asked to say to you that the charge in this case and the service rendered was a service rendered to the Kaufman Brewing Company and not to Henry Wolf, and that Henry Wolf's name having been laid in the indictment as the person to whom this charge was made that the facts proven to not agree with the allegations in the indictment, and there could be no conviction in this case because in truth and in fact the freight was paid by the Kaufman Brewing Company. We may say to you, gentlemen, that under these bills of lading, it being stipulated on the bills of lading that the goods were to be delivered to the order of the shipper, and the bills of lading having been endorsed and the freight having been paid by Henry Wolf himself, we cannot so instruct the jury as requested by the defendants; in other words, that, the payment being made by Henry Wolf himself, it was such a charge as would justify the laying of his name in the indictment as the person whom the defendant company had collected an undue account of freight from, or charged, if it did so collect it."

And at his request the court notes an exception thereto May 15th, 1895.

JOS. BUFFINGTON, *D. J.* [SEAL.]

4. The defendant excepts, by his counsel, to the following portion of the charge of the court to the jury, viz:

15 "Conceding these men were differently situated, that Bruening had his beer delivered from his siding to his warehouse on the Panhandle road, and that Wolf could not have such a delivery, and that Bruening was in a position from these facts that the Baltimore & Ohio railroad (defendant's road), if untrammeled by the interstate-commerce act, would naturally offer him a lower rate than it would Mr. Wolf in order to get his trade, yet we are constrained to say that this difference between the two shippers, when considered in relation to the Panhandle road, does not constitute such circumstances and conditions as are contemplated in this second section of this act, and that the party in such circumstances, apart from all other considerations, warranted the charging of Wolf's larger rate for performing a like service than it did Bruening. These facts—that is, the advantage of location in connection with the Panhandle road—were matters that were personal to Wolf and Bruening, and as regards the defendant's proposition to carry their freight it did not affect the goods to be transported or affect in any way the transportation service to be rendered, so far as this second section is concerned. The second section does not provide for a uniform charge for two different shippers whose business advantages, whose locations, and whose facilities are substantially similar, and who are in those regards under substantially similar circumstances, but what it does give is a uniform rate where transportation itself is of a like kind of traffic and such transportation is furnished under substantially similar circumstances. Such class of transportation—that is, where it is of a like kind of traffic and where the transportation itself is under substantially similar circumstances and conditions—forms a uniform class upon which the railroad is entitled to put a certain rate of freight, and each and every

16 shipper who asks for the transportation of that particular character—that is, of a like kind of traffic and under substantially similar circumstances and conditions—is entitled to receive such transportation at the uniform rate, no matter what his advantages or disadvantages in other respects may be. It is the freight itself, its quantity, its character, and such other factors, and the transportation of such freight which are the elements to be considered in determining the class to which it shall be assigned when the rate of tariff is to be collected, and if the traffic is of a like kind and character and the transportation is to be made under substantially similar circumstances and conditions, then the law says the rate shall be uniform with shippers of that class."

And at his request the court notes an exception thereto May 15th, 1895.

JOS. BUFFINGTON, *D. J.* [SEAL.]

5. The defendant excepts, by his counsel, to the following portion of the charge of the court to the jury, viz:

"Now, what are the facts in reference to the transportation of this beer? What rate—and that is a fact for you to determine—

what rate in fact and in substance, under the evidence in this case, was charged Mr. Bruening for the transportation of this beer from Cincinnati to the terminal station at Pittsburgh? Was it the same rate as was charged Mr. Wolf? If it was, then your verdict
17 should be that of not guilty. Or was Mr. Bruening charged a different rate for a like service under substantially similar circumstances and conditions than Mr. Wolf was? You will notice, gentlemen, from the facts that there are two questions for you to determine—first, was there a like service rendered these two men—a like contemporaneous service rendered these two men—in the transportation of a like kind of traffic under similar circumstances and conditions? If there was a like service rendered, then was Mr. Wolf charged for that service more than Mr. Bruening was. If you find both of these facts to be in the affirmative, then your verdict would be a verdict of guilty in manner and form as the defendant stands indicted. If, on the other hand, you find on the definitions of these terms and instructions as given you by the court there was not a like service performed for these men, or, if there was a like service, that they were charged the same rate for that service, then your verdict would be that of not guilty."

And at his request the court notes an exception thereto May 15th, 1895.

JOS. BUFFINGTON, *D. J.* [SEAL.]

6. The defendant excepts, by his counsel, to the following portion of the charge of the court to the jury, viz:

"He was charged 15 cents, but it is a matter for the jury to determine under all of the evidence what service was performed for Mr. Wolf; where his beer was hauled from; where was it
18 hauled to; what charges were made him for that service; was there a like service of the same kind of traffic under the same circumstances performed for Mr. Bruening; if it was, how much was the charge for that service which was like equivalent to the service that was performed for Mr. Wolf? And in that connection we will read to you the remarks made in a court of the United States upon a trial of one of these cases of a similar character:

'It is said that the contract of a carriage of a railway common carrier is generally understood such transportation of the goods from the warehouse of the railway at the point of shipment to the railway house at the point of destination. Generally the cartage from the railway house to the storehouse of the consignee is paid by him. If the railway company pays it the expense of transporting the goods to the place where he can use them is lessened by the cost of cartage. This is generally equivalent to the railroad company reducing the freight by as much as the cartage would cost the consignee.'"

And at his request the court notes an exception thereto May 15, 1895.

JOS. BUFFINGTON, *D. J.* [SEAL.]

Filed October 7, 1895.

19 *Charge of the Court.*

GENTLEMEN OF THE JURY: In this case the defendant C. S. Wight is charged upon an indictment containing a single count, alleging that he is guilty of an offense under the second section of the interstate-commerce law for an unlawful discrimination in charges made upon freight. The case involves a very narrow margin for the determination of the jury. While the case is criminal in name, it is in substance a dispute of a civil nature, to wit, the meaning of the second section of the interstate-commerce law *is* as applied to the facts of this case.

It seems that in 1892 Mr. Bruening, a wholesale dealer in beer in this city, had a warehouse upon a private siding connected with the main line of the P., C., C. & St. L. R. R.

Over this line he shipped his beer from Cincinnati, in the adjoining State of Ohio, to Pittsburgh. The beer was brought to the yards of the P., C., C. & St. L. R. R., and from there shifted to the doors of his warehouse and taken direct from the cars into the warehouse. The tariff rate charged for this entire service by the P., C., C. & St. L. R. R. was 15 cents per hundredweight in car-load lots. The Baltimore & Ohio R. R., in connection with the B. & O. S. W. R. R., was one of the two other competing lines between Cincinnati and Pittsburgh, and in order to obtain the business of Mr. Bruening it was proposed to Bruening that it would deliver beer from Cincinnati to his warehouse at the same rate, namely, 15 cents per 100 lbs. The freight agent of the B. & O. S. W. R. R. went to the Pittsburgh Transfer Company and obtained a rate from them of 3½ cents per 100 lbs. for carting the beer from the B. & O. R. R. siding to Mr. Bruening's warehouse. The B. & O. R. R. had
20 no rail connection with the Bruening warehouse, and it was a physical impossibility to make one. The established rate for carrying beer from Cincinnati to Pittsburgh over the B. & O. R. R. was also 15 cents per 100 lbs. Mr. Bruening suggested to the railroad people that he might as well haul the beer himself from the station as have it done by a third party, and it was thereupon agreed that Mr. Bruening should pay 15 cents per 100 lbs., the regular tariff rate for the beer in car-load lots, and that he should do the hauling himself and for that hauling he should be paid at the rate of 3½ cents per 100 lbs. This indictment generally alleges that the B. & O. R. R. or, rather, Mr. Wight, the defendant, who was its general freight agent, transported this beer from Cincinnati to Pittsburgh, in fact, for 11½ cents per 100 lbs., the contention of the Government being that the defendant agreed to transport the beer to the warehouse, and that the transportation of the beer from the siding to the warehouse was worth 3½ cents per hundredweigh-; so that, in fact, what was really charged to Mr. Bruening was a rate of 11½ cents per hundredweight between Cincinnati and the terminus of the road here at the B. & O. R. R. siding.

Now, the Government goes further and alleges that at the same time the B. & O. R. R. was furnishing this transportation to Mr.

Bruening for 11½ cents per 100 lbs. it charged Henry Wolf, who was another shipper of the same commodity, in like lots, under similar circumstances and conditions, a rate of 15 cents per 100 lbs. We may say to you in that connection, gentlemen, that Mr. Wolf, as appears from the evidence in this case, was the lessee of a warehouse situated across the street and within sixty or seventy feet of Mr. Brue-ing's. He had no railroad connection to his own with the P., C., C. & St. L. R. R. It appears that some time previously he had used the switch of Mr. Rea, who charged him a price per car for passing his cars over it to the warehouse; that afterwards he had forbidden him using it
21 at all, and the contention of the defendant in this case—very frankly made upon the stand by Mr. Wight—is that under his understanding and construction of the law as embodied in this second section of the interstate-commerce law, that he had a right to take into consideration the circumstances and conditions of these two shippers; that inasmuch as Mr. Wolf had no connection whatever with the P., C., C. & St. L. R. R. and was forced to cart his beer, no matter by what route he obtained it, that there was no injustice or difference of rate in fact in giving Bruening, who had a siding upon the P., C., C. & St. L. R. R., a like rate upon the B. & O. R. R.—in other words, that his circumstances and conditions were such that Mr. Wight was justified in not only agreeing to transport the beer to Pittsburgh, but in going further and paying for the transportation of the beer from the siding up to the warehouse itself. So that, gentlemen, you see the issue in this case narrows down to the fact, was there a like and contemporaneous—that is, a service at the same time performed for these two men in the transportation of a like kind of traffic, and was it under substantially similar circumstances and conditions? This leaves, gentlemen, the question open for the court to instruct you as to what the meaning of these terms are in connection with the facts which you are called upon to pass upon in this case. The purpose of the second section of the interstate-commerce law, gentlemen, was to afford to all shippers who applied for transportation of like characters of freight by the railroad company under similar circumstances and conditions—that all of that class should receive a uniform rate; that there should be no discrimination between them. The franchises or powers of *a* railroad company as common carriers empower them to transfer freight from their terminal station at Cincinnati to their terminal station at Pittsburgh. That was all they could
22 legally be called upon to do. If a shipper in Cincinnati desired a railroad company to go to his place of business and put his freight in drays and carry it to a terminal station, that was a matter which the railroad company as a common carrier was not bound to do. It could do it if it saw fit, but it was a matter of grace and not of right on the part of the railroad. So, when the freight was brought to the other terminal, the railroad company would have a right, if it saw fit, to deliver the freight in carts or wagons, but that was a matter which it was not called upon as a common carrier to do as a matter of right. For ordinary purposes

the terminals of these roads was the limit of their duty—so far as the transportation was concerned—of their duty as common carrier, unless they saw fit to accept a further duty in the way of delivering the goods off the line of their road. I mean unless they saw fit to undertake the delivery of the goods by carts or wagons.

Now, gentlemen, were these men, Bruening and Wolf, rendered a like service? Did they have a like kind of traffic, and was the transportation made under substantially similar circumstances and conditions? It is admitted in this case—or at least there is no conflict in the testimony—that the beer was shipped in car-load lots *lots*, that it was shipped from the same station—Brighton station, in Cincinnati—and was received at the same terminal station here by both men.

In this connection we may say that the question has been raised that the beer which was shipped to Mr. Wolf was in a different condition from that shipped to Mr. Bruening. The bills of lading covering the Wolf shipments have been given in evidence. It seems by them that the beer was shipped by the Kaufman Brewing Company of Cincinnati to the care of Henry Wolf, at Pittsburgh, and to the bills of lading a draft was attached. Those drafts came to the German National bank, in Pittsburgh, and Mr. Wolf
23 then paid the draft, took the bill of lading down to the B. & O. R. R. station, and received the beer there. We have been asked to say to you that the charge in this case and the service rendered was a service rendered to the Kaufman Brewing Company and not to Henry Wolf, and that Henry Wolf's name having been laid in the indictment as the person to whom this charge was made that the facts proven do not agree with the allegations in the indictment, and there could be no conviction in this case, because in truth and in fact the freight was paid by the Kaufman Brewing Company. We may say to you, gentlemen, that under those bills of lading, it being stipulated on the bills of lading that the goods were to be delivered to the order of the shipper, and the bills of lading having been endorsed and the freight having been paid by Henry Wolf himself, we cannot so instruct the jury as requested by the defendants; in other words, we charge you that, the payment being made by Henry Wolf himself, it was such a charge as would justify the laying of his name in the indictment as the person from whom the defendant company had collected an undue amount of freight from, or charged it, if it did so collect it.

Now, gentlemen, did the situation of these parties as they were upon the P., C., C. & St. L. R. R.—as their warehouses were located there—were those such circumstances and conditions as justified the defendant charging a different rate for the transportation of these car-load lots of beer? The act of Congress says: "If any common carrier subject to the provisions of this act shall directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers and property subject to the provisions of this act than it charges, demands, collects, or re-

ceives from any other person or persons for doing for him
24 or them "—(now, mark you)—"a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination." Now, were these facts in reference to the situation of the parties on this Panhandle road the circumstances and conditions which are contemplated by this second section of the act? Conceding these men were differently situated, that Bruening had his beer delivered direct from his siding to his warehouse on the Panhandle road, and that Wolf could not have such a delivery, and that Bruening was in such a position from these facts that the Baltimore & Ohio railroad (the defendant's road), if untrammelled by the interstate-commerce act, would naturally offer him a lower rate than it would Mr. Wolf in order to get his trade, yet we are constrained to say that this difference between the two shippers when considered in relation to the Panhandle road does not constitute such circumstances and conditions as are contemplated in this second section of this act; that they were not such circumstances and conditions as, apart from all other considerations, warranted the charging of Wolf a larger rate for performing a like service than it did Bruening. These facts—that is, the advantage of location in connection with the Panhandle road—were matters personal to Wolf and Bruening, and as regards the defendant's proposition to carry their freight did not affect the goods to be transported or the transportation service to be rendered so far as this second section is concerned.

The second section does not provide for a uniform charge for two different shippers whose business advantages, whose locations, and whose facilities are substantially similar and who are in those regards under substantially similar circumstances, but what it does give is a uniform rate where the transportation itself is of a like kind of traffic and such transportation is furnished under
25 substantially similar circumstances and conditions. Such class of transportation—that is, where it is of a like kind of traffic and where the transportation itself is under substantially similar circumstances and conditions—forms a uniform class, upon which the railroad is entitled to put a certain rate of freight, and each and every shipper who asks for the transportation of that particular character—that is, of a like kind of traffic and under substantially similar circumstances and conditions—is entitled to receive such transportation at the uniform rate, no matter what his advantages or disadvantages in other respects may be. It is the freight itself, its quantity, its character, and such other factors, and the transportation of such freight which are the elements to be considered in determining the class to which it shall be assigned when the rate of tariff is to be fixed, and if the traffic is of a like kind and character and the transportation is to be made under substantially similar circumstances and conditions, then the law says the rate shall be uniform to shippers of that class. To hold the law otherwise would, to our mind, sap it of its usefulness. If the circumstances and conditions referred to in the act are to embrace all

the personal factors of the business conditions, locations, facilities, and the like of individual shippers, then we introduce elements of such uncertainty, probable ill judgment, and possible favoritism that confusion and injustice would result. As a matter of policy, expediency, and business sagacity it may well be that the defendant company had good reasons for treating the shipper, Bruening, in the way it did, and that if it did not he would, from the very fact of his warehouse being more advantageously situated upon another line, receive his freight by that route. If the railroad company wished to establish a rate to meet those conditions, it had a right to do so in Mr. Bruening's case or for the character of business which they were seeking to carry, but when it established that rate
26 it must be a uniform rate to all other persons who asked it to transport the same character of traffic at the same time, under substantially similar circumstances and conditions. Now, gentlemen, as we view this case, the fact that Mr. Bruening had railroad facilities upon the Panhandle road more advantageous than Mr. Wolf had is not in itself such a fact and circumstance as is contemplated in this second section and is not to be considered as justifying a different rate—the making of a different rate for Mr. Bruening and for Mr. Wolf—if such a rate was in fact made.

Now, what are the facts in reference to the transportation of this beer? What rate—and that is a fact for you to determine—what rate in fact and in substance, under the evidence in this case, was charged Mr. Bruening for the transportation of this beer from Cincinnati to the terminal station at Pittsburgh? Was it the same rate as was charged Mr. Wolf? If it was, then your verdict should be that of not guilty. Or was Mr. Bruening charged a different rate for a like service under substantially similar circumstances and conditions than Mr. Wolf was? You will notice, gentlemen, from the facts that there are two questions for you to determine. First, was there a like service rendered these two men—a like contemporaneous service rendered these two men—in the transportation of a like kind of traffic under similar circumstances and conditions?

If there was a like service rendered, then was Mr. Wolf charged for that service more than Mr. Bruening was? If you find both of these facts to be in the affirmative, then your verdict would be a verdict of guilty in manner and form as the defendant stands indicted. If, on the other hand, you find on the definitions of these terms and instructions as given you by the court there was not a like service performed for these men, or if there was a like service that they were charged the same rate for that service, then
27 your verdict would be that of not guilty.

At the close of the charge, counsel for defendant said to the court that both Wolf and Bruening had been charged and had paid the same freight, so far as the service performed for each was the same, viz., fifteen cents per hundred, and asked the court to so instruct the jury; whereupon the court added:

Mr. Wolf was charged fifteen cents, but it is a matter for the jury to determine, under all of the evidence, what service was performed

for Mr. Wolf, where was his beer hauled from, where was it hauled to, what charge was made him for that service, was there a like service of the same kind of traffic under the same circumstances performed for Mr. Bruening; if it was, how much was the charge for that service which was like—equivalent to—the service that was performed for Mr. Wolf? In that connection we will read to you the remarks made in a court of the United States upon a trial of one of these cases of a similar kind: "It is said that the contract of carriage of a railway—common carrier—is generally understood such transportation of the goods from the warehouse of the railway at the point of shipment to the railway house at the point of destination. Generally the cartage from the railway house to the storehouse of the consignee is paid by him. If the railway company pays it, the expense of transporting the goods to the place where he can use them is lessened by the cost of cartage. This is generally exactly equivalent to the railroad company reducing the freight by as much as the cartage would cost the consignee."

Filed October 7, 1895.

28 Endorsement: No. 18. Oct. term, 1894. Criminal docket. United States district court, west. dist. of Penna. United States *vs.* C. S. Wight. Charge of court. Exceptions of defendant. Filed October 7, 1895.

29 *Verdict.*

In the above case we find the defendant C. S. Wight guilty in manner and form as indicted.

F. C. SHAFFER, *Foreman.*

May 15, '95.

Filed May 15, 1895.

30 Endorsement: No. 18. October term, 1895. (Crim. docket.) United States district court, west. dist. of Pa. United States *vs.* C. S. Wight. Verdict. Filed May 15, 1895.

31 In the District Court of the United States for the Western District of Pennsylvania.

THE UNITED STATES *vs.* C. S. WIGHT. } No. 18. Oct. Term *Term*, 1894. Criminal Docket.

And now, to wit, 5th Nov., A. D. 1895, the sentence of the court is that you pay a fine to the United States of one thousand, $1,000, dollars; that you pay the costs of this prosecution and stand committed until this sentence be complied with.

BY THE COURT.

32 [Endorsed:] No. 18. October term, 1894. (Criminal docket.) United States district court, western district of Pennsylvania. The United States *vs.* C. S. Wight. Sentence of the court. Filed Nov. 5, 1895.

33 *Motion for New Trial.*

And now, May 18th, 1895, the defendant moves the court to direct a new trial herein for following reasons:

1. That there is no sufficient evidence in the cause to justify or sustain the conviction.
2. That the verdict is against the weight of the evidence.
3. That the court erred in its answers to the points presented on behalf of defendant.
4. That the court erred in matters of law in its instructions to the jury.

HUGH L. BOND,
JOHNS McCLEAVE,
Att'ys for Def't.

34 Endorsement: No. 18. October term, 1895. Crim. docket. United States *vs.* C. S. Wight. Motion for new trial. And now, May 18th, 1895, rule granted. By the court. Filed May 18, 1895.

35 *Opinion of the Court Surmotion for New Trial.*

BUFFINGTON, *J.:*

The defendant C. S. Wight, the general freight agent of the Baltimore & Ohio R. R. Co., was found guilty in this court upon an indictment charging him with unjust freight discrimination. The allegation was that he charged one Bruening eleven and a half cents per hundred pounds for transporting car-load lots of beer from Cincinnati to Pittsburgh, while he charged one Wolf fifteen cents for the same service. A new trial was moved for for the reasons:

1. That there is no sufficient evidence in the cause to justify or sustain the conviction.
2. The verdict was against the weight of the evidence.
3. The court erred in its answers to the points presented on behalf of defendant.
4. The court erred in matters of law in its instructions to the jury.

The proofs show the published tariff *sale* of the road between the points named was fifteen cents per hundred pounds for freight of that character. Bruening's warehouse was on the line of a competing road—the Panhandle—which carried his beer for fifteen cents per hondred between the points named and delivered the cars at his warehouse by means of a switch without extra charge. The B. & O. had its Pittsburgh freight station about two squares from the warehouse and its line was so located that no switch connection was possible with Bruening's place. To obtain his busi-

36 ness the B. & O. Co. agreed to transport Bruening's beer from Cincinnati by rail and cart it from its Pittsburgh freight station to his warehouse at fifteen cents per hundred. The railroad company ascertained the cartage would cost it three and one-half

cents per hundred pounds, so Bruening agreed to do it himself at that figure instead of the company hiring a transfer Co. to do it, as had been contemplated. Accordingly thereafter Bruening paid fifteen cents per hundred, the regular tariff rate, for the freight and received from the railroad three and one-half cents per hundred for cartage. During the four months shown in testimony—June, July, August, and September, 1892—the railroad paid Bruening for cartage an aggregate of $2,375.18. Munn, the cashier of the road, testified there was no record of these payments to Bruening; that he made no such payments nor authorized them. Checks of Mr. Wight to the order of the secretary, Anderson, were drawn for Bruening's monthly bills. They were cashed by Anderson, and Bruening testifies the money was actually paid him by Gallaher, the freight agent of the road, or by the cashier. We think the jury had sufficient evidence before them to justify a finding (which they must have done to arrive at their verdict) that for carrying the beer from Cincinnati to Pittsburgh the railroad company, through the defendant, charged Bruening eleven and a half cents per hundred pounds freight. Indeed, as much is virtually admitted by the defendant. His testimony was:

Q. So in order to do any transportation business for Mr. Bruening what was necessary to be done?

A. In order to take care of Mr. Bruening's business we had to deliver the freight at the same point for the same compensation.

Q. As the Panhandle road?

A. Yes, sir.

37 Q. And that point was where?

A. That point was at his warehouse.

Q. Now, to do that what did you do?

A. How is that?

Q. In order to accomplish that, what did you do?

A. We had to pay the cartage from our tracks to the warehouse to put ourselves on an equality with the Panhandle at the same "rate."

It was contended, and the jury have evidently so considered it, that the service rendered was twofold—the freightage and the cartage. The admittedly fair price of the latter was three and a half cents per hundred, and it followed that the company received for freightage over its line eleven and a half cents.

Of the right of the company to establish and publish an eleven-and-a-half-cent rate between the points named or of its right to do cartage there can be — objection, but complaint is made that for the same service rendered Bruening for eleven and a half cents the company was at the same time charging Wolf fifteen-cent rate. The latter was engaged in the beer business in Pittsburgh and shipped his beer from Cincinnati to that point. His warehouse was substantially the same distance as Bruening's from the B. & O. freight station. He received his beer there in car-load lots, paid fifteen cents freight upon it, and hauled it to his warehouse at his own expense.

This difference in charge the defendant would justify on the ground that Wolf's warehouse, while it was on the Panhandle road,

had no connecting siding with it; that, no matter by what road he received it, he had to cart his beer at his own expense from the station to the warehouse, and that these were facts which for-
38 bade the services rendered to him and Bruening being deemed by the jury like services rendered under similar circumstances and conditions. The court, however, charged that these differences in location and advantage were not the circumstances and conditions contemplated by the second section of the interstate-commerce act.

For the reasons set forth in the charge we think the instructions given on this point were correct. They are also in accord with the English cases bearing on legislation of a kindred character:

London and Northwestern Railway Co. *vs.* Evershed, 3 Law Reports (1877–1878) Appeal Cases, p. 1028; Harris *vs.* Cockermouth & Workington R'y Co., 1 Railway & Canal Traffic Cases, 104; Thompson *vs.* London and N. W. R'y Co., 2 Railway & Canal Traffic Case-, 115; Great Western Railway Co. *vs.* Sutton, L. R. 4 H. L., 226.

The motion for a new trial is refused.

39 Endorsement: No. 18. October term, 1895. Criminal docket. United States district court, western district of Penna. United States *vs.* C. S. Wight. Opinion, Buffington, J. Surmotion for new trial. Filed October 7, 1895.

40 *Testimony Taken Before Hon. Joseph Buffington, J., and a Jury.*

Appearances: Harry Hall, Esq., for the United States; Johns McCleave and Hugh L. Bond, Esqs, for defendant.

PITTSBURGH, PA., *May* 31*st*, 1895.

Counsel for the United States offer in evidence the original copies of classification 9 and 10, September, 1891, to January, 1893, duly filed with the Interstate Commerce Commission in accordance with the requirements of section 6 of act to regulate commerce, which classifications are applicable to all the tariffs of the Baltimore and Ohio railroad in effect during the period named, and which bear the notation, "Governed by official classification."

Also schedule of rates and charges filed with the Interstate Commerce Commission by the Baltimore & Ohio and Baltimore & Ohio and Southwestern Railroad Company, the same being known as the Baltimore and Southwest Railroad joint rate tariff No. 5, taking effect February 1st, 1892, which said rates and charges show, among others, the rates from Cincinnati, Ohio, to Pittsburgh, Pa., via the Baltimore & Ohio railroad, in force from February 1st, 1892, until the present time.

F. H. BRUENING, a witness produced and sworn on behalf of the United States, testified as follows on direct examination by Mr. Hall:

Q. Where do you live?

41 A. I live in Pittsburgh.

Q. You may state what business you were engaged in in the year 1892.

A. Wholesale dealer in beer.

Q. Wholesale dealer in beer?

A. Beer; yes, sir.

Q. Where did you purchase the beer?

A. Cincinnati.

Q. Over what road did you ship from Cincinnati to Pittsburgh?

A. B. & O.

Q. Did you ship beer in car-load lots?

A. Yes, sir.

Q. What rate per hundred did you pay?

A. Fifteen cents.

Q. Did you receive any part of that 15 cents per hundred back?

A. Yes, sir.

Objected to unless what the witness received back was as rebate or drawback on the specific sums as charged to and paid by him as the rate. If he received other money from the Baltimore & Ohio Railroad Company on other accounts, that is an objectionable question. We certainly object to this question unless the money paid by the Baltimore & Ohio Railroad Company to Mr. Bruening was paid on account of and as a rebate on the freight actually charged and paid by him on this specific shipment charged in the indictment and upon the date therein charged. The indictment charges them with collecting a less rate than the tariff rate from Mr. Breuning on the 27th day of July, 1892, and of course the testimony should be confined to the shipment specified in the indictment and of the date therein specified.

42 Mr. HALL: The date is entirely immaterial, as in any other indictment, providing the offense is committed within two years before the finding of the indictment.

Mr. MCCLEAVE: It seems to me you have to prove the offense charged, and the offense charged is as to a specific amount on a specified date, and it is as to that specific shipment that the defense has been prepared.

Mr. HALL: There is no specific shipment charged. The date is formal.

The COURT: Make your offer, Mr. Hall.

Mr. HALL: These people had established a joint tariff of rates covering a certain period which is within the statute of limitations. We propose to show that during that period covered by this joint rate, which had been established at various times and upon various dates, they shipped to Bruening beer, and that during a like period during the same period, not on the same day exactly, but during the same period covered by these tariff rates and schedules, they

also shipped beer to Wolff, and to Mr. Bruening they paid a rebate and to Mr. Wolff they did not.

Former objection renewed; and further object especially on the ground that the act makes each transaction within the period a separate offense, separately triable and punishable.

The COURT: Is it your idea that the testimony should be confined to the specific date alleged in the indictment? The Government is not bound by the date fixed in the indictment. For the present, therefore, the objection is overruled.

To which ruling counsel for defendant excepts, and — their
43 instance a bill is sealed.

JOS. BUFFINGTON, [L. S.]
Dist. Judge.

May 13th, 1895.

By Mr. HALL:

Q. What amount per hundred was paid back to you?
A. It was 3½ cents.
Q. Three and one-half cents per hundred?
A. Yes, sir.
Q. How were the settlements made with you, monthly or otherwise?
A. Made monthly.
Q. To whom were the payments made?
A. The payments for freight?
Q. By whom were the payments made to you?
A. They were made by Mr. Gallagher, the general freight agent.
Q. Who was Mr. Gallagher?
A. The freight agent of the B. & O. road.
Q. Did he make them to you individually?
A. Yes, sir.
Q. Can you tell from your books how much was paid to you during the months of June, July, August, and September, 1892?

Objected to for the reason given in the previous questions as calling for a period of time not called for in the indictment.
Objection overruled.
To which ruling counsel for defendant excepts, and at their instance a bill is sealed.

JOS. BUFFINGTON, *D. J.* [L. S.]

13th May, 1895.

A. Yes, sir.

The COURT: Do I understand that you will follow this up
44 with evidence of the shipments made by Mr. Wolff during these periods about which you are now inquiring?
Mr. HALL: Yes, sir; the period of this discrimination.

Q. Have you your books here?
A. I haven't them with me.

Q. Are they in town?
A. They are; yes, sir.
Q. You can get them here?
A. Yes, sir.

Cross-examination by Mr. M'CLEAVE:

Q. Where is your place of business in this city?
A. Second avenue and Try street.
Q. On the line of what railroad?
A. On the line of the Panhandle.
Q. That is the Pittsburgh, Cincinnati and St. Louis railroad?
A. Yes, sir.
Q. How close are you to the tracks of that railroad—how close is your warehouse?
A. About 10 feet.
Q. And from the main tracks of that railroad what connection has your warehouse with that?
A. Well, there was a switch in there.
Q. You have a switch, have you?
A. Yes, sir.
Q. A siding?
A. Yes, sir.
Q. Where does that siding commence? Where does it connect up with the main tracks—how far from your place?
A. Do you mean to the warehouse?
45 Q. Yes; to the warehouse.
A. 30 or 40 feet.
Q. For what length does it run along past your place?
A. All along there.
Q. Well, for about what distance? What is the length of that siding approximately?
A. The length of the whole siding?
Q. Yes, sir; from one end of it to the other.
A. About 300 feet.
Q. How close does that siding go to the door of your warehouse?
A. Within ten feet.
Q. Within ten feet?
A. About that.
Q. Now, the shipments over this Pittsburgh, Cincinnati and St. Louis railway consigned to you—what was the practice of that company in delivering to you?
A. They put the cars on our siding.
Q. Well, the cars that came from Cincinnati, made up in a regular train, would be taken to the Grant-street yard of that company, wouldn't they?
A. Yes, sir.
Q. That is the yard of the company up at Grant street?
A. Yes, sir.
Q. And then the shipping engine would take the cars consigned

to you and bring them back and put them on the siding in front of your door?

A. Yes, sir.

Q. So that you could unload from the car right into your warehouse?

A. Yes, sir.

46 Q. Now, was that the practice of that company in the shipments made to you?

A. Yes, sir; generally.

Q. And was there any charge made to you for services outside or in addition to the rate—the tariff rate—established between Cincinnati and Pittsburgh?

A. No, sir.

Q. So that you had these goods delivered directly into your warehouse—any shipments over that railroad—for the regular tariff rates?

A. Yes, sir.

Q. No charge made for that? Well, now, the Baltimore & Ohio yard is located at the foot of Grant street, running from Grant up nearly to 10th street, is it not?

A. Yes, sir.

Q. Has that railroad any siding connection leading up to your warehouse?

A. No, sir.

Q. And the topography of the ground is such that they could not give a siding connection to your warehouse, could they?

A. No, sir.

Q. So that with any shipment made by the Baltimore & Ohio Company, what did they have to do?

A. We had to haul the beer.

Q. Haul it in wagons?

A. Yes, sir.

Q. And by what route would those shipments have to be hauled from the Baltimore and Ohio track to your warehouse?

A. Why, they would send the cars near to Greenough
47 street and we would drive from Greenough to Water street and along Water street to Ross and around Ross to Second and into our alley.

Recess.

Afternoon Session.

F. H. BRUENING, the witness, resumes the stand, and cross-examination continued by Mr. McCleave:

Q. About how far is it from the yard of the Pittsburgh, Cincinnati & St. Louis railroad, at the head of Grant, down to your place?

A. It is about half a mile.

Q. And it is over the railroad between these points that they switch these cars into your siding?

A. Yes, sir.

Q. Now, on what account was this 3½ cents a hundred which you say was paid you by the Baltimore & Ohio Company paid?

A. On account of hauling beer.

Q. To pay the expenses of hauling the beer from the Baltimore & Ohio yard by the route you have described up to your place?

A. Yes, sir.

Q. What kind of cars was this beer shipped in?

A. Cars?

Q. Yes; what kind of cars.

A. Refrig-ator cars.

Q. It was shipped in a refrig-ator car?

A. Yes, sir.

Q. What advantages in the way of storing beer and in the kind of car used did the delivery on the siding give you over hauling from the B. & O. yard?

A. Well, we have been at different times short of beer on that account, and oftentimes the cars were shipped to our ware-
48 house so we could unload them.

Q. Cars from where?

A. On the Panhandle.

Q. Now, how about the refrigerator cars on the Baltimore & Ohio road?

A. Well, they were our own cars, you know.

Q. They were your own cars?

A. Yes, sir.

Q. You opened the car and hauled the entire contents at the time you wanted it?

A. Yes, sir.

Q. Now, was that a fair cost, a fair amount representing the expenses of that service performed by you?

A. It was, I judge.

Q. With whom was this arrangement made, with what officer, what man?

A. Why, a gentlemen by the name of Chambers.

Q. Mr. Chambers?

A. Yes, sir.

Q. You made this arrangement with a man by the name of Chambers, you say?

A. Yes, sir.

Q. When you made this arrangement with Chambers what was his first proposition as to who should do the hauling?

A. I think his first proposition was that the Pittsburgh Transfer Company haul the beer.

Q. That is, that the Baltimore & Ohio Company would have the Pittsburgh Transfer Company haul this beer to you?

A. Yes, sir.

Q. Well, now, by whose proposition was it then that you were permitted to do the hauling? What did you say to them?

49 A. I made the proposition that if they could haul the beer at 3½ cents a hundred I would judge I could do it too, and to let me haul it.

Q. That is, Chambers told you that the price that the Pittsburgh Transfer Company proposed to charge was 3½ cents?

A. 3½ cents a hundred.

Q. Your counter-suggestion was instead of paying the transfer company that the railroad company pay you that if you did the hauling?

A. Yes, sir.

Q. What advantage did that give you over paying the transfer company to — it? Did it make it more convenient for you?

A. Well, I had the wagons.

Q. You had the teams already?

A. The teams.

Q. And by the use of your own teams you could haul it at any time you saw fit?

A. Yes, sir.

Q. You say that was a fair price for the hauling?

A. Yes, sir.

Q. Was this arrangement in any way a rebate or drawback or device to cut the rate between Cincinnati and Pittsburgh?

A. There was nothing said about the rates at that time.

Q. Do you know where Henry Wolff's place of business is?

A. Yes, sir.

Q. He is in the beer business too, is he?

A. Yes, sir.

Q. Where was his place?

A. Right opposite me, on the corner of Try and Second also.

50 Q. Now, had he a delivery siding connected with the Panhandle railroad?

A. Not of his own.

Q. Well, did he have a siding that he used, that the Panhandle Company used to make deliveries to his store?

A. I never saw him unloading on any.

Q. Now, you have testified that the settlements were made monthly. Now, tell us what the fact was. Did you pay the full tariff rate on each shipment made to you?

A. When I paid my freight?

Q. Yes, sir.

A. Yes, sir.

Q. Then, subsequently, what was done as to the bill for the hauling?

A. At the end of the month I sent my bill in for hauling the beer.

Q. The amount of the bill was ascertained by taking the number of pounds you had hauled and multiplying it by 3½ cents?

A. Yes, sir.

Q. Now, Mr. Bruening, supposing you had to do the hauling from the Baltimore & Ohio yard to your place of business at your own expense, what would have been the result of that as to your shipments between Pittsburgh and Cincinnati?

A. What would be the result of it?

Q. Yes, sir. Would you have been compelled to ship then by the Panhandle route alone?

A. No.

Q. If you had had to bear the expense of hauling yourself from the Baltimore & Ohio yard to your warehouse, would that have confined your shipments practically to the Panhandle road?

A. No, sir.

51 Q. Why?

A. They would come over the Lake Erie.

Q And suppose you had to bear the expenses of hauling from the Lake Erie station?

A. We would have the advantage of the Panhandle then.

Q. So, then, there are three lines from Pittsburgh to Cincinnati—the Panhandle, Baltimore & Ohio, and Pittsburgh & Lake Erie?

A. Yes, sir.

Q. And neither the Baltimore & Ohio nor the Lake Erie Company have any siding connections with your place?

A. No, sir.

Q. The Panhandle is the only road with which you could have a siding connection so as to receive deliveries on the track in carload lots?

A. Yes, sir.

Q. So unless either the Baltimore & Ohio or the Lake Erie would pay the expense of hauling from their various stations to your place you would be compelled to ship by the Panhandle road?

A. Yes, sir.

Mr. HALL:

Q. These refrigerator cars which you use you say were your own cars?

A. Yes, sir; they were our own cars.

Q. Did you use the same cars in your shipments over the Panhandle?

A. No, sir.

Q. You say that the Panhandle had a siding right alongside of your warehouse?

A. Yes, sir.

Q. Prior to the time that you made this arrangement with
52 the Baltimore & Ohio to allow you 3½ cents per hundred for cartage did you ship from there over the Panhandle road?

A. Yes, sir.

Q. Did you ship any after you made this arrangement with the B. & O.?

A. I think we did for a short time.

Q. Did you finally cease shipping entirely by the Panhandle?

A. Yes, sir.

Q. Notwithstanding the fact that the Panhandle have a siding right at your warehouse and the B. & O. is half a mile away, would the fact that they paid you 3½ cents a hundred for cartage make it more advantageous for you to ship over the B. & O.?

A. Well, yes; it would be.

Q. You say that these rebates or these amounts for cartage, which you call it, were paid to you principally by Mr. Gallagher?
A. Yes, sir.
Q. The division freight agent?
A. Yes, sir.
Q. Did anybody else pay any of it?
A. Now, I cannot recollect. I did not always go down.
Q. Who else went down?
A. Mr. Wible.
Q. Who was that?
A. The book-keeper.
Q. He is here, is he?
A. Yes, sir.

Mr. McCLEAVE:

Q. What was the reason, after this arrangement was made, that you changed the shipments from the Panhandle to the Balti-
53 more & Ohio? Was it because you got better service between Cincinnati and Pittsburgh?
A. You mean the short time?
Q. Yes, sir.
A. That was on account of the railroad strike.
Q. After this arrangement was made by which you were paid the expense of this hauling, what was the reason that you abandoned the shipments on the Panhandle and shipped by the Baltimore & Ohio after the Baltimore & Ohio was placed on an equality as to delivery with the Panhandle?
A. Well, there was one reason that was one disadvantage to the Panhandle: In the hot summer our beer lays there on the track. It has often laid on the siding of the Panhandle at night, and in the day we couldn't get at it with our wagons and couldn't unload it. They didn't give us shipping service at all.
Q. They didn't treat you right in the prompt movement of cars at your station?
A. That is right.

J. G. WIBLE, being duly sworn on behalf of the United States, testified as follows on direct examination by Mr. Hall:

Q. Were you in the employ of Mr. F. H. Bruening during 1892?
A. I was.
Q. In what capacity?
A. Book-keeper.
Q. You may state whether or not you have rendered bills
54 to the Baltimore & Ohio Railroad Company for the beer that was shipped to Mr. Bruening over that road monthly.

Objected to unless the question is confined to the shipments charged in the indictment.

By the COURT: If you say the beer that was testified to by the witness, objection overruled.

To which ruling counsel for defendant except, and at their instance and request bill sealed.

JOS. BUFFINGTON, *D. J.* [SEAL.]

13th May, 1895.

A. I did.

Q. Now, will you please examine your books and let us know what amounts were shipped during the months of June, July, August, and September, 1892, for which you rendered bills at the rate of 3½ cents?

Objected to because the shipments called for in the question are not mentioned or referred to in the indictment. Objection overruled.

To which ruling counsel for defendant except, and at their instance and request bill sealed.

JOS. BUFFINGTON, *D. J.* [SEAL.]

13th May, 1895.

A. Do you mean the number of pounds or amounts?

Q. The number of pounds.

—. For the month of June there were 1,491,912 pounds.

Q. What does that amount to at 3½ cents?

A. $522.17. For the month of July, 1,816,419 pounds.

55 Q. What does that amount to?

A. $635.74. For the month of August, 1,834,343 pounds.

Q. What does that amount to?

A. $642.02.

Q. September?

A. 1,644,993 pounds, amounting to $575.75.

Q. You may state whether those amounts were paid.

A. Yes, sir.

Mr. McCLEAVE: If he knows.

Mr. HALL:

Q. You say they were paid?

A. Yes, sir.

Q. How were they paid—in cash or by check?

A. Sometimes they were paid in cash and again they were paid by check or voucher.

Q. Did you receive any of those payments yourself?

A. Yes, sir.

Q. From whom?

A. Sometimes they were brought to the office—the vouchers—and sometimes Mr. Stewart Munn, the cashier, collected them.

Q. Mr. Stewart Munn?

A. Yes, sir.

Q. For whom is he cashier?

A. For the Baltimore & Ohio Railway Company.

No cross-examination.

56 HENRY WOLFF, a witness produced and sworn on behalf of the United States, testified as follows on direct examination by Mr. Hall:

Q. Where do you live, Mr. Wolff?
A. On Logan street.
Q. This city?
A. Yes, sir.
Q. What is your business?
A. Wholesale beer dealer.
Q. Were you engaged in the same business in 1892?
A. Yes, sir.
Q. Where did you purchase your beer?
A. Cincinnati.
Q. Where is your warehouse located?
A. Second avenue and Try, right across from Mr. Bruening's.
Q. Right across the street from Mr. Bruening?
A. Yes, sir.
Q. You may state whether during the months of June, July, August, and September, 1892, you shipped any beer in car-load lots from Cincinnati to Pittsburgh over the Baltimore & Ohio railroad.

Mr. BOND: We object to this general form of question unless it is to be followed by proof of specific shipments and unless the prosecution is to be confined in any questions submitted to the jury to the specific shipments so proved; and we further object to this form of proof on the ground that the best evidence of these shipments, or rather the best evidence of the facts necessary to be proved under this indictment, is found in the bills of lading themselves
57 given in the shipments. The indictment follows the language of the law, and the charge is demanding, collecting, and receiving from Mr. Bruening a less amount than was charged, demanded, and collected from Henry Wolff for doing for him a like contemporaneous service—that is to say, it has got to appear that there was a contract of shipment with Mr. Wolff, and I say that the best evidence, the original evidence, of that contract of shipment lies in the bills of lading themselves. They have made no demand on us for the original bills of lading, but we are ready to produce any original bills of lading which they demand as showing the specific shipments on which they rely in this case.

Objection overruled; to which ruling counsel for defendant except, and at their instance and request this bill is sealed.

JOS. BUFFINGTON, *D. J.* [SEAL.]

13th May, 1895.

(Question read.)
A. I did ship it.
Q. Now, have you with you the bills of those shipments or receipts from the Baltimore & Ohio?
A. I have the bills and everything.
Q. Who shipped this beer to you?
A. The Kauffmann Brewing Company.

Q. Of Cincinnati?
A. Yes, sir.
Q. Were you notified when the beer arrived?
A. Yes, sir.
Q. By whom?
58 A. By the Baltimore & Ohio Railroad Company.
Q. Did you pay the freight on those shipments?
A. I did.
Q. When, before or after you got the beer?
A. Before, because the bill of lading was sometimes attached to the draft and I had to pay the draft before I got the beer.
Q. To whom did you pay this freight?
A. Generally gave it to one of my sons and they brought it over to the depot and got a receipt.
Q. What rate per hundred did you pay?
A. Fifteen cents.
Q. Did you receive any allowance for cartage?
A. No, sir; I didn't know any such thing was at that time.
Q. Are these the receipts for the payment of that freight? (Receipts shown witness.)

Mr. BOND: We object to this kind of testimony unless it be followed by evidence showing that Mr. Wolff was the person for whom this transportation service is alleged to have been performed in the indictment; otherwise we should like to be privileged to move to strike out all this testimony as irrelevant.

Mr. HALL:

Q. This beer was ordered by you, I understand, from the Kaufmann Brewing Company of Cincinnati?
A. It was.
Q. I understand you to say it was?
A. Yes, sir; the tariffs attached to it will show that it was
59 ship- to me.

The COURT: Just wait and answer the questions that are asked.
Mr. HALL: I will offer now the receipts as follows:
Receipt dated June 17, 1892, for 25,760 pounds of beer at 15 cents, $38.64. (Signed) Stewart Munn, cashier.
Receipt dated July 18, 1892, for 25,625 pounds of beer at 15 cents, $38.44. (Signed) Stewart Munn, cashier.
Receipt dated July 25th, 1892, for 25,580 pounds of beer at 15 cts., $38.37. (Signed) Stewart Munn, cashier.
Receipt dated July 30th, 1892, for 25,395 pounds of beer at 15 cents, $38.00. (Signed) Stewart Munn, cashier.
Receipt dated August 4th, 1892, 25,640 pounds of beer at 15 cents, $38.46. (Signed) Stewart Munn, cashier.
Receipt dated August 10th, 1892, for 25,550 pounds of beer at 15 cents, $33.33. (Signed) Stewart Munn, cashier.
Receipt dated August 15th, 1892, for 25,625 pounds of——
60 Receipt dated August 20th, 1892, car 4585, loaded with beer from ——, $39.00. (Signed) J. H. Epplesheimer.

Receipt dated September 27th, 1892, 25,625 pounds of beer at 15 cents, $38.44.

Receipt dated September 1st, 1892, for 25,745 pounds of beer at 15 cents, $38.62.

Receipt dated September 10th, 1892, for 25,625 pounds of beer at 15 cents, $38.44.

Receipt dated September 15th, 1892, for 25,550 pounds of beer at 15 cents, $38.33.

Objected to on the ground that the receipts mentioned cover times not mentioned or referred to or charged in the indictment.

Objection overruled.

To which ruling counsel for defendant except, and at their instance and request bill sealed.

JOS. BUFFINGTON, *D. J.* [L. S.]

13th May, 1895.

Cross-examination by Mr. McCLEAVE:

Q. All of these shipments were made to the order of the Kaufmann Brewing Company?

A. No, sir.

Q. Please show me where there is a shipment shown there not to the order of the Kaufmann Brewing Company.

A. They were——

Q. Just answer the question.

A. All drawn to the order of the Kaufmann Brewing Company except one.

Q. And that does not show to whose order it is shipped?

61 A. That is to my order.

Q. This receipt does not show to whose order on the yellow paper?

A. It is shipped to me.

Q. Just answer the question. This receipt on the yellow paper does not show to whose order the goods are shipped. Are they not to the order of the Kaufmann Brewing Company?

A. To my order.

Q. Show me one there that is to your order.

A. Every one.

Q. They are all to your order?

A. Yes, sir; I paid the freight on it.

Q. The bills of lading in each case covering these shipments which you have testified to were attached to the drafts, weren't they?

A. Yes, sir; every one.

Q. And you had to take up the draft before you could get the property?

A. Yes, sir.

Q. Covered by the bill of lading?

A. Yes, sir.

Q. So that in each case it was a shipment to shippers' order, notify you?

A. That would be the way; yes, sir.

Q. And you had to wait until you were notified by the bank?

A. By the railroad company.

Q. By the railroad company or by the bank. These bills of lading went to some bank here for collection, didn't they?

A. Yes, sir; the German National bank.

Q. What bank?

A. The German National bank.

Q. Then you would go to that bank and lift the draft and get possession of the bill?

A. Yes, sir.

Q. And you couldn't get possession of the goods until you did produce the bill?

62 A. No, sir.

Q. In other words, it was a negotiable bill of lading, with draft attached?

A. The bill of lading was not negotiable.

Q. You had no private siding with the Panhandle connected with your place of business?

A. There is a siding there.

Q. Just answer the question. You had no private siding connected with the Panhandle railroad?

A. I have one——

The COURT: Please confine yourself to the questions counsel asks you. He asks you if you have a private siding connected with that road?

A. No, sir; I have not.

Mr. MCCLEAVE:

Q. And you had no siding upon which the Panhandle road was in the habit of making delivery to you in car-load lots, had you?

A. I had.

Q. Whose siding was it?

A. Henry Rea, Jr.

Q. Henry Rea owned the siding and he stopped you from receiving deliveries on that track, didn't he?

A. He did not; I do it today.

Q. At any time before this were you in the habit of receiving deliveries from the Panhandle road?

A. Yes, sir.

Q. On that siding?

A. Yes, sir.

Q. Who owns the track?

A. Mr. Rea.

63 Q. How many car-loads did you receive on that track from the Panhandle railroad?

A. On the Panhandle, about 300.

Q. When?

A. During 1892 and 1895.

Q. Previous to July, 1892, how many had you received?

A. On that same identical track—that side track—about 27 or 28.

Q. Previous to July?
A. Yes, sir.
Q. How long had you been in business previous to July, 1892?
A. 15 years.
Q. At the same place?
A. No, sir.
Q. I mean at that place.
A. I have been there since 1892.
Q. You were in business in that place, then, two years?
A. Yes, sir.
Q. And you had received on that siding, you say, 27 cars?
A. Received on the siding.
Q. Did Rea make any charge to you for it?
A. Yes, sir.
Q. What did he charge you?
A. $1.25.
Q. For how much—for a car?
A. For a car-load; yes, sir.
Q. And you had to pay that to Rea?
A. Yes, sir.

Mr. HALL:

Q. Mr. Wolff, when you hauled your beer from the Baltimore & Ohio railroad to your place over what road did you haul it?
64 A. Well, they took it from one of their tracks, six or seven tracks, to my place and over the same way Mr. Bruening has hauled his.
Q. How was that?
A. We measured it the other day. It is 140 yards from my place and 172 to Mr. Bruening's.
Q. 140 yards from the Baltimore & Ohio siding to yours and 172 to Mr. Bruening's?
A. Yes, sir.
Q. Mr. Bruening has testified that that beer was hauled to his place around by Water street to Ross street and then up Second avenue?
A. He could do that.
Q. Well, did you do it?
A. Why, no; I drove in a straight line. He could go in a straight line, too.
Q. Was it necessary for him to haul it around by Water and Ross streets?
A. It might not be as hard on his horses, but that would be all.
Q. I understand you to say that he might have hauled it in the same way that you hauled yours?
A. More easy, for his horses are stronger than mine.
Q. Did you haul, yourself, through Try street?
A. Yes, sir; a very good street, too.

Mr. MCCLEAVE:

Q. It is a very steep grade up Try street, isn't it?

A. Not a bit, not speaking of Pittsburgh, what you would call a high grade.

Q. Then you would have a railroad track to cross, too?

A. That is a switch of the Panhandle railroad.

Q. You had that to cross?

A. That is just as level as the public street to pass.

65 Q. And you were able to pull a full load up that grade?

A. 10 barrels would be very easy to pull.

Q. If you pulled 10 barrels up there, how many barrels could a pair of horses haul around the other way?

A. I don't go that way any more; that would depend on the wagon.

Q. There are wagons made specially for hauling beer—you have a wagon made specially for hauling beer, don't you?

A. No.

STEWART MUNN, being duly sworn on behalf of the United States, testified as follows in answer to questions on direct examination by Mr. Hall:

Q. Where do you live?

A. Reflectorville, Castle Shannon railroad.

Q. What is your business?

A. Cashier of the B. & O. railroad.

Q. State, Mr. Munn, whether these are receipts for freight payments.

(Receipts handed witness.)

A. Yes, sir; made by my authority.

Q. Mr. Bruening has testified that some of these payments of 3½ cents per hundred were made by you, is that a fact, during the months of June, July, August, and September, 1892?

A. No, sir; it is not.

Q. You did not make any payments to Mr. Bruening during those months?

A. No, sir.

Q. Did you ever make any payments to Mr. Wible, Mr. Bruening's book-keeper?

66 A. I made none.

Q. You were cashier of the B. & O. during those months?

A. Yes, sir.

Q. Did you authorize any one to make such payments to Mr. Bruening?

A. Not to my remembrance. There is no record of anything of that kind, either, and I have no remembrance of it.

No cross-examination.

C. A. CHAMBERS, a witness produced and sworn on behalf of the United States, testified as follows on direct examination by Mr. Hall:

Q. Where do you live?
A. Cincinnati.
Q. Where did you live in 1892?
A. The same place.
Q. What position did you hold in 1892?
A. Contracting freight agent.
Q. For what road?
A. The B. & O. and S. W.
Q. Mr. Bruening testifies that he made an arrangement with you with regard to paying 3½ cents a hundred on shipments of beer from Cincinnati to Pittsburgh; is that correct?
A. Partially.
Q. What part of it is correct?
A. Well, the matter was talked over with me, and I visited the Pittsburgh Transfer Company to get their figures and than finally went back.

Mr. MCCLEAVE:

Q. Figures for what?
67 A. For hauling beer from the B. & O. and S. W. yards to Mr. Bruening's warehouse, and then went back and talked with Mr. Bruening about an arrangement. He then said if we could have it hauled for that he would like to do it at the same figure, and I simply reported the matter in that status, and that is all I know about it.
Q. To whom did you report the matter?
A. I reported it to the general freight agent of the B. & O. and S. W. road.
Q. Who is that?
A. R. M. Frazier.
Q. Did you make any report of that to Mr. Wight?
A. No, sir.
Q. Who else was present when you had this conversation with Mr. Bruening?
A. Mr. F. D. Buskirk.
Q. Anybody else?
A. No, sir.
Q. Were you authorized to make any agreement with Mr. Bruening to allow him for cartage?
A. No, sir.
Q. By whose direction did you have this conversation with Mr. Bruening?
A. Under my general authority as contracting freight agent of the system in the interest of the line.
Q. You had no special instruction in regard to Mr. Bruening?
A. No, sir.

Q. And you say you reported the conversation you had with him to R. M. Frazier?

A. Yes, sir.

Q. And you never discussed the matter of the conversation with Mr. Bruening about the cartage with Mr. C. S. Wight?

A. No, sir; I did not.

Q. Mr. Frazier was the general freight agent of the Baltimore & Ohio and Southwestern?

A. Yes, sir.

68 Cross-examination by Mr. McCLEAVE:

Q. What was the figure the Pittsburgh Transfer Company gave you for hauling?

A. Three and a half cents.

Q. Per hundred pounds?

A. Yes, sir.

Q. And your proposition—your first proposition with Mr. Bruening was for your company to have the Pittsburgh Transfer Company do the hauling for that figure?

A. My first proposition was to Mr. Bruening; he said he would give us the business on second-day delivery if it did not cost him any more than it would by the Panhandle, and then, on my own responsibility, I went out there and hunted up this transfer company and it was, if I remember rightly, referred to that transfer company to see Mr. Billington. I did not meet him, and consequently I met a man there that was the chief clerk; I don't know what his name was, some clerk in the office, and then I went back and talked with Mr. Bruening.

Q. And the purpose of the arrangement was to equalize the B. & O. delivery with that which could be obtained from the Panhandle?

A. Yes, sir; that was the idea.

Q. And the Panhandle was delivering by this track that Mr. Bruening has mentioned directly into his warehouse?

A. Yes, sir.

Q. Well, now, Mr. Chambers, was it possible for you to get this trade—your company was under the disadvantage of having no facility for delivery by track to the Bruening warehouse?

A. No, sir.

Q. Without paying for this hauling?

A. No, sir; we could not get in without the hauling or transferring back by team.

Q. This transfer company that you saw was a company engaged here in hauling from one part of the town to another?

69 A. Yes, sir.

Mr. HALL:

Q. I understand you to say that you were the contracting freight agent for the B. & O. and S. W.?

A. Yes, sir.

Q. Had you authority to make contracts such as this?

A. Well, I had authority, but when it came to making a contract that there was as much business as this about it, I usually wanted to confer with my superiors, which I did in this case.

Q. Between where does the B. & O. and S. W. run—to what point?

A. Between Cincinnati and Midland City, 45 miles.

Q. And from Midland City to Pittsburgh over what road would this freight pass?

A. B. & O.

Q. Had you any connection with the Baltimore & Ohio railroad?

A. Well, I was contracting agent for the Midland route of which the B. & O. forms a part.

Q. Who was the general freight agent for the Baltimore & Ohio?

A. Mr. Wight.

Q. The defendant?

A. Yes, sir.

Q. Could you fix the rates for freight running over the Baltimore & Ohio without Mr. Wight's consent?

A. I cannot answer that question. What do you mean?

Q. Could you alter the existing rates over the Baltimore & Ohio and over the Midland route without the consent of C. S. Wight?

A. I don't know. I never had anything to do with him and he had no connection with me. I reported to Mr. Frazier.

Q. I was not asking you who you reported to.

A. I had nothing to do with Mr. Wight; I never conferred with him.

Q. Did you make any rates over the Midland route to your shippers?

70 A. In some cases, yes; not at this end.

Q. Did you make any rates from Cincinnati to Pittsburgh?

Mr. McCLEAVE: Now, what is the object of this? I object to it as immaterial and irrelevant.

Mr. HALL: I want to show who authorized the payment of this.

Mr. McCLEAVE: That is not the way to find out.

Mr. HALL:

Q. Are you familiar with the signature of R. M. Frazier?

A. Yes, sir; I think I can tell it.

Q. Have you seen him write?

A. Once or twice.

(Papers shown witness.)

Q. State whether that is his signature. Take a look at that.

A. As near as I can say, that look- like Mr. Frazier's signature, and that looks like it.

Adjourned until May 14th, 1895, at 10 o'clock a. m.

71 *Proceedings of May 14th, 1895.*

F. H. BRUENING, recalled on behalf of the United States, testified as follows on direct examination by Mr. Hall:

Q. Mr. Bruening, you testified that you made this arrangement with Mr. Chambers. When was that arrangement made?
A. It was made in 1892, I believe.
Q. What time in 1892?
A. It was June, I believe.
Q. The first of June?
A. In the month of June.
Q. How was your beer shipped to you from Cincinnati?
A. Over the railroad.

Objected to as immaterial.

Q. What I mean is whether it was shipped on bills of lading.

Objected to as immaterial.
Objection overruled, and bill of exception noted for defendant.
JOS. BUFFINGTON. [L. S.]
14th May, 1895.

A. Yes, sir.
Q. To the order of the Morelein Brewing Company?

Objected to as immaterial and as not being the best evidence, the bills of lading being the best evidence.
(Question withdrawn.)

Cross-examination by Mr. MCCLEAVE:

Q. You testified yesterday as to the route by which you did the hauling. Why did you take that route?
A. Why, because I should think it impossible to haul the beer by the route of Try street.
Q. It was impossible to haul it up there?
A. Yes, sir.
Q. What was the condition of that route up Try street?
A. Well, in the first place, it is very steep; and the second objection was there is a siding crossing it.
72 Q. Right above?
A. Yes, sir; that siding was never crossed with any satisfaction. It would kill more horses than anything else would.
Q. For that reason you were compelled to haul by a longer route?
A. Yes, sir.

JAMES T. LEAL, a witness produced and sworn on behalf of the United States, testified as follows on direct examination by Mr. Hall:

Q. Where do you live?
A. I reside at present at various hotels in Pennsylvania where my business calls me.

Q. Where were you employed in 1892?

A. As contracting agent for the Baltimore & Ohio railroad at Pittsburgh.

Q. Contracting freight agent?

A. Contracting freight agent; yes, sir.

Q. Had you any knowledge of an arrangement existing in regard to rebating to Mr. Bruening 3½ cents a hundred for cartage charges on his beer?

A. Yes, sir.

Q. Were you present when that arrangement was made?

A. Yes, sir.

Q. State whether you had any conversation with Mr. C. S. Wight in regard to that arrangement at that time.

A. No, sir.

Q. You never had?

A. No, sir.

73 Q. You were not aware whether Mr. Wight had any knowledge of that arrangement?

A. I have reason to believe that——

Objected to as incompetent and irrelevant.

The COURT: He can testify as to any facts he knows of, not the inference he draws. If he heard any one say that to Mr. Wight, it is competent.

Mr. HALL: I don't know how his knowledge may have been acquired.

The COURT: You may ask if he knows anything of his own knowledge or whether it was drawn from inferences.

Mr. HALL:

Q. Mr. Leal, I ask you the question whether Mr. Wight had any knowledge of that arrangement.

A. He had; yes, sir.

Q. I want you to give such facts as you know of your own knowledge.

A. Yes, sir; he had. He had knowledge of the arrangement.

Q. How do you know he had knowledge of the arrangement?

A. Because of the correspondence which was submitted in a business way, and I had possession of it.

Q. You were in Mr. Wight's office?

A. Directly under T. W. Gallagher.

Q. Mr. T. W. Gallagher was division freight agent?

A. He was the division freight agent; yes, sir.

(Letters handed witness.)

Q. Is that the correspondence to which you refer?

A. That is part of it.

74 Q. What are those papers?

Counsel for the defendant objects to the use of the correspondence until it has been proven, on the ground that it has not been sufficiently proven yet.

Mr. HALL: When I do undertake to offer this correspondence I propose to show that the correspondence was in the possession of this defendant, and that the correspondence is the evidence of the arrangement or agreement, the circumstances showing that there was an arrangement or agreement between these two defendants, Frazier and Wight, the two men charged in this indictment with violating the interstate-commerce law.

Objection withdrawn.

Mr. HALL:

Q. State what these papers are.

A. These are the copies taken at the time that the original letters were filed.

Q. Copies of whose letters are they?

Mr. BOND: They speak for themselves as to that.

Mr. HALL:

Q. What I want to know is where these letters came from.

A. They came from the Baltimore & Ohio copy book.

Q. Whose copy book?

A. C. S. Wight's copy book.

Q. And from whose file were these other letters taken?

A. Baltimore & Ohio's.

Q. Well, whose files, whose office?

A. General freight agent's.

Q. C. S. Wight's?

A. Yes, sir.

75 Mr. HALL: My idea is that if these letters were in C. S. Wight's possession, it is to be presumed he had knowledge of their contents. It don't make any difference who wrote them. It is not necessary to prove their execution.

Cross-examination by Mr. MCCLEAVE:

Q. What position did you have in the Baltimore & Ohio road?

A. Contracting freight agent.

Q. What time, during what time?

A. From December 22 to June, 1893.

Q. What years?

A. 1890 until 1893—December 22, 1890, to June 30th, 1893.

Q. You left there in June, 1893?

A. Yes, sir.

Q. Where did you get these letters that Mr. Hall has?

A. I turned them over to the commission.

Q. I ask you where did you get them.

A. I got them in the office where they belonged down there.

Q. From whose office did you get them?

A. C. S. Wight's office, general freight agent's office.

Q. How did you get them?

A. I took them and turned them over to the Government.

Q. How did you get them out of his office?
A. I took them.
Q. From what books?
A. From the correspondence on file.
Q. What did you take them for?
A. For protection.
Q. To protect yourself?
A. To protect myself.
76 Q. What protection did you need?
A. In a case of this kind, a man no longer in the employ of the company would be the man that it would be assumed committed the crime.
Q. So you felt that you had had a hand in the commission of a crime, did you?
A. Oh, no; no, sir. I felt the B. & O. officials would try to make it appear that I had.
Q. You thought Mr. Wight had?
A. I know that he had; yes, sir.
Q. So you stole those letters from these books?
A. No, sir; I turned them over to the Government.
Q. You stole the letters from Mr. Wight's books, did you?
A. I took them; I didn't steal them.
Q. You took them and they didn't belong to you?
A. They were referred to me in an official way.
Q. You took them—you didn't let Mr. Wight know you had taken them?
A. He knew it afterwards.
Q. He didn't *no* it at the time?
A. No.
Q. They were Mr. Wight's property, and according to your statement you took them without his knowledge?
A. Yes, sir.
Q. You don't call that stealing?
A. No, sir; not under the circumstances.
Q. A man picks your pocket of your watch without your knowledge. That is not theft? When you got them out of his office you took them to the Interstate Commerce Commission?
77 A. I put them in an envelope and mailed them.
Q. And that was immediately after you were discharged from the service?
A. Yes, sir.
Q. How long after?
A. Well, it was before I left the employ.
Q. Then while you were still in the employ of the company?
A. Yes, sir.
Q. You took this correspondence and turned it over to the Interstate Commerce Commission?
A. Yes, sir.
Q. Was that your sense of your duty to your employers?
A. That was my sense of my duty to myself and the Government under which I lived.

Q. You were employed by Mr. Wight, weren't you?
A. I was employed by the Baltimore & Ohio.
Q. By Mr. Wight?
A. Yes, sir.
Q. While you were employed by Mr. Wight you stole papers out of his office and gave the information to the Interstate Commerce Commission and had him indicted. That is your situation today?
A. Yes; I suppose it is.
Q. Did the Interstate Commerce Commission pay you anything for this?
A. No, sir.
Q. Have you been paid anything——
A. No, sir.
Q. For your services in relation to this case?
A. My mileage from the place that I speak of.
78 Q. What hotel did they find you in?
A. When?
Q. When they subpœnaed you.
A. I was subpœnaed in Chicago.
Q. What hotel?
A. The Hotel Woodbine. I was working for the Lake Shore.
Q. Now?
A. I was working for it at the time I was subpœnaed.
Q. When were you subpœnaed?
A. On the 20th day of April, to appear here on the 9th of May.
Q. You say you are working for the Lake Shore railroad now?
A. I was working for them; I am not now. Since I have come here I / have a position with a publishing house, traveling through northern Pennsylvania.
Q. When did you come to the city?
A. I arrived here the 30th of April.
Q. And have you been here ever since?
A. No, sir; I have been in Pennsylvania.
Q. Well, what hotels?
A. The last hotel?

(Question withdrawn.)

JAMES MUNN, being duly sworn on behalf of the United States, testified as follows on direct examination by Mr. Hall:

Q. Are you familiar with the signature of D. T. McCabe?
79 A. Yes, sir.

(Paper shown witness.)

Q. Is that his signature there?
A. Yes, sir.
Q. Are you familiar with the signature of R. M. Frazier?
A. Not very. I think that is Mr. Frazier's signature.
Q. What is that?
A. That is, too.
Q. You are the general freight agent——

A. Division freight agent.
Q. Of the Pittsburgh, Cincinnati and Saint Louis?
A. Yes, sir.

Cross-examination by Mr. M'CLEAVE:

Q. What is your business?
A. I have the title of division freight agent.
Q. Division freight agent of what?
A. Of the P., C. & St. L. railway.
Q. That is the Panhandle road?
A. Yes, sir.
Q. You are the gentleman that pleaded guilty of unlawful discrimination?

Objected to.
The COURT: He is called here to prove a signature.

Mr. MCCLEAVE:

Q. That is a competitive road of the Baltimore & Ohio?

Objected to and objection sustained.

80 Counsel for the United States offer in evidence the letters referred to for the purpose of showing knowledge on the part of the defendant of the arrangement alleged to have been made.

J. V. PATTON, being duly sworn on behalf of the United States, testified as follows on direct examination by Mr. Hall:

Q. What is your business?
A. General superintendent of the Baltimore & Ohio railroad and Southwestern.
Q. Do you know Mr. C. S. Wight?
A. Yes, sir.
Q. What position does he hold?
A. General freight agent.
Q. Mr. Patton, will you explain to the court and jury what the duties of the general freight agent of the Baltimore & Ohio are?
A. He has in a general way charge of the freight business and making of rates and routing of freight and making of arrangements with affiliated lines for the hauling of such freight, and prorates and various duties of that kind.
Q. He is the chief officer, as I understand it, of the freight department?
A. He is one of them—yes, sir—and directly under the traffic manager.
Q. Are the division freight agents and local freight agents subordinate to him?

81 A. Under his jurisdiction; yes, sir; under the jurisdiction of which he has charge.
Q. In the city of Pittsburgh?
A. Yes, sir.

Q. I want to ask you, Mr. Patton, if the Baltimore & Ohio and Southwestern is part of the Baltimore & Ohio system.

A. No, sir; it is a separate organization. It is very closely connected—very closely affiliated—with the Baltimore & Ohio, yet it has a separate organization and a separate system.

Q. I want to ask you how the freight shipped from Cincinnati to Pittsburgh was shipped by continuous route over these two lines, the Baltimore & Ohio and South-ern and Baltimore & Ohio.

A. Over the Baltimore — Ohio and Southwestern to Midland City and then over the B. & O. proper.

Mr. McCLEAVE: You offer the letters for the purpose of showing knowledge on the part of the defendant of the arrangement.

Mr. HALL: Yes, sir.

Objected to by counsel for defendant as incompetent and irrelevant, and also for the reason that they do not tend to sustain the offer.

The COURT: I have looked over this correspondence and I cannot see how it is relevant to the case. While it has a general
82 bearing on the case, I do not see how it bears on the particular issue involved.

Mr. HALL: It is relevant to show there was an understanding between Mr. Frazier and Mr. Wight in regard to the rates on the beer between Cincinnati and Pittsburgh, which was being made at that time.

Mr. McCLEAVE: Without these letters are competent, is there anything in this case to connect Mr. Wight in any way with this arrangement? I don't know of any. Mr. Leal is the only witness that said he had reason to think that Mr. Wight had knowledge of the arrangement from this correspondence. This is the correspondence he referred to.

Objection sustained.

83 A. J. ANDERSON, being duly sworn on behalf of the United States, testified as follows on direct examination by Mr. Hall:

Q. What is your business?

A. I am secretary to the general freight agent.

Q. Mr. Wight?

A. Yes, sir.

Q. Did you occupy that position in the months of June, July, August, and September, 1892?

A. Yes, sir.

Q. Did you see the bills rendered by F. H. Breuning against the B. & O. road for 3½ cents a hundred on beer shipped by him from Cincinnati to Pittsburgh?

Objected to as immaterial.

Objection overruled and bill of exception sealed for defendant.

JOSEPH BUFFINGTON, *D. J.* [L. S.]

14th May, 1895.

Q. I say, did you see those bills?
A. I can't say that I did.
Q. Well, can you say that you did not?
A. I can't remember.
Q. How is that?
A. I don't remember.
Q. You don't remember?
A. No, sir.
Q. Is it or is it not a fact that you drew checks for the amount of Mr. Bruening's bills monthly to the order of Mr. Wight?
84 A. No, sir.
Q. Or to any one else's order?
A. Well, I drew checks; yes, sir.
Q. To whose order?
A. To my own.
Q. To your own order?
A. Yes, sir.
Q. Did Mr. Wight sign those checks?
A. Yes, sir.
Q. Did you get them cashed?
A. Yes, sir.
Q. To whom did you give the money?
A. At that time?
Q. Yes, sir.
A. I don't know that I can answer that definitely.
Q. What is the best of your recollection?
A. Well, I can't tell you just at that time who I paid them to. I am not positive.
Q. Did you pay it to Mr. Gallagher?
A. I can't tell you that.
Q. Did you pay it to Mr. Bruening?
A. No, sir.
Q. Did you pay it to Mr. Munn?
A. No, sir.
Q. Did you have any conversation with the party that you did pay it to as to what was to be done with it?
A. I don't remember that.
Q. Did you have any conversation with Mr. Wight in re-
85 gard to the drawing of those checks or the payment of that money to Mr. Bruening?
A. He may have told me to draw the check.

No cross-examination.
Counsel for the United States rest.
Mr. McCleave opens the case on behalf of the defendant.

STEWART MUNN, a witness recalled on behalf of defendant, testified as follows on direct examination by Mr. McCleave:

Q. You told us yesterday, I believe, that you were cashier of the Baltimore & Ohio Railroad Company?
A. Yes, sir.

Q. In that position have you charge of the bills of lading for shipments coming over the railroad?

A. Yes, sir.

Q. I show you some receipts that were put in evidence here yesterday and ask you if you have examined your files for the original bills of lading for the shipments referred to in these receipts.

A. Yes, sir.

Q. Did you find them?

A. Yes, sir.

86 (Bills of lading produced.)

Q. Are those the bills of lading?

A. They appear to be the bills of lading.

Q. Corresponding to the shipments referred to in the receipts?

A. Yes, sir; I got them myself.

Q. These are the shipments from the Kaufmann Brewing Company to their order, are they—all?

A. Yes, sir; beer orders.

Q. And for such beer as was finally delivered to Henry Wolff?

A. Delivered according to these bills of lading.

Q. These bills of lading came attached to the drafts?

A. Yes, sir; they were attached to the drafts, but the drafts would be lifted by the bank.

Counsel for defendant offer in evidence the bills of lading identified by the witness, the same being marked "Ex. No. 1."

Admitted without objection.

87 C. S. WIGHT, the defendant, being duly sworn in his own behalf, testified as follows on direct examination by Mr. McCleave:

Q. You are the general freight agent of the Baltimore & Ohio railroad?

A. Yes, sir.

Q. How long have you been such?

A. Since 1885.

Q. Has that road a line between Pittsburgh and Cincinnati?

A. Yes, sir.

Q. In connection with the Baltimore & Ohio and Southwestern?

A. Yes, sir.

Q. What other railroad routes do you compete with between Cincinnati and Pittsburgh?

A. The Pittsburgh, Cincinnati & St. Louis and Chicago railroad and the Pittsburgh and Lake Erie and the B. & O. and the C., H. & D.

Q. How many lines are competing with the Baltimore & Ohio between Cincinnati and Pittsburgh?

A. About two.

Q. Two?

A. Yes, sir.

Q. This Pittsburgh, Cincinnati & St. Louis is the one commonly known as the Panhandle?

A. Yes, sir.

Q. And the other is what?

88 A. Well, the other is a combination, if not a direct, through line. It is made up of several other small lines, but the principal competitor is the Panhandle railroad.

Q. Now, is beer a principal article of carriage from Cincinnati to Pittsburgh?

A. It is one of the principal ones; yes, sir.

Q. What are the situations of beer dealers in Pittsburgh with respect to the Baltimore & Ohio road?

A. Well, our line between Pittsburgh and Cincinnati is at a disadvantage on account of the breweries having located their houses on the older roadway; consequently when we attempt to do any business *were* we are placed at a disadvantage, because we cannot reach the warehouses of the principal brewers of the town.

Q. Where are these beer dealers principally situated?

A. On the Panhandle tracks or adjacent thereto.

Q. In what locality?

A. Principally down at Try and Second avenue and some around on the freight tracks.

Q. Well, those that are so situated on the Panhandle, have they, most of them, siding connections with the Panhandle road?

A. Yes, sir.

Q. For deliveries?

A. Yes, sir.

Q. Take this case of Mr. Bruening. He is situated on the Panhandle?

A. Yes, sir.

Q. And has a siding connection with the Panhandle railroad?

A. Yes, sir.

Q. Has he any connection with the Baltimore & Ohio, or

89 would it be possible for you to make a connection with his property?

A. He has not. It would be a physical impossibility to make connection with his warehouse.

Mr. HALL: I think we can shorten this case by entering my objection now. I object to this line of examination for this reason: It has no bearing whatever on the case at bar—the question of equalization of rates between the Panhandle and the Baltimore & Ohio. Conceding, for the sake of argument, that they have the legal right to pay cartage—conceding that they have the right to pay cartage to Mr. Breuning, that has nothing to do with this indictment. The charge in this indictment is that they discriminated between Bruening and Wolff; that they gave Bruening advantages which they did not give to Wolff. It is not a question of putting them on terms of equality with the Panhandle road. It is a question as to whether they gave Bruening certain advantages in their freight which they did not give to Wolff. The proof is that while

they were right across the street from each other and had the same distance to haul that they paid Bruening 3½ cents for cartage, and they didn't pay Wolff anything for cartage. It don't make any difference whether they had any right to pay cartage or not. The charge here is that they paid cartage to one and did not pay it to another.

By the COURT: We will not attempt here to determine
90 these questions or what bearing they may have upon the case.

Mr. MCCLEAVE:

Q. Now, how was Mr. Wolff's place of business situated with respect to the Panhandle railroad?

A. The Panhandle has no track to Mr. Wolff's house.

Q. Now, did the Panhandle make deliveries on this siding to Mr. Bruening?

A. Yes, sir.

Q. Did they make similar deliveries to Wolff?

A. No, sir; because they had no siding.

Q. So in order to do any transportation business for Mr. Bruening what was necessary to be done?

A. In order to take care of Mr. Bruening's business we had to deliver the freight at the same point for the same compensation.

Q. As the Panhandle road?

A. Yes, sir.

Q. And that point was where?

A. That point was at its warehouse.

Q. Now, to do that what did you do?

A. How is that?

Q. In order to accomplish that what did you do?

A. We had to pay the cartage from our tracks to the warehouse to put ourselves on an equality with the Panhandle at the same rate.

Q. Mr. Wight, was this allowance for the cost of hauling
91 to the Bruening warehouse in fact or intention a drawback or rebate or device to do this transportation for Mr. Bruening for less compensation than for Mr. Wolff?

A. No, sir; not in any sense. We were compelled to make the same rate and deliver the freight at the same charge or we could not compete for the business. That question came up through the general freight agent, Mr. Frazier, advising me that he had endeavored to secure some of these shipments and that he had been unable to do so and sent his representative to Pittsburgh and, I ascertained the reason, found out what it was necessary to — equalize us on the deliveries. He stated to me that although he, under our tariff arrangement, could make arrangements without consultation, that as the delivery was in Pittsburgh he would prefer to consult with me. I then looked into the matter to satisfy myself that we were justified in taking Mr. Bruening's proposition, as far as Mr. Bruening's bill was concerned, and then notified Mr. Frazier that we would join in that arrangement.

Q. That was at what time?

A. The correspondence commenced in May. The arrangement was made early in June, 1892.

Q. What other shippers of beer are there on your line?

A. The Kaufmann Brewing Company of Cincinnati.

Q. Did you know anything of Henry Wolff at that time?

A. No, sir.

Q. What is the practice, or is it not the practice in other cities for railroad companies to pay the drayage?

Objected to as incompetent.

92 The COURT: You are not charged here with paying drayage. You are charged with discrimination.

Objection sustained.

Counsel for defendant offer to prove by the witness on the stand that the cost of drayage or cartage is paid by all the railroad companies or by various railroad companies in the cities of Baltimore, Washington, Cincinnati, and elsewhere, and that such fact or any reference thereto is not made in the joint tariffs filed with the Interstate Commerce Commission under the provisions of the statute; that this has been a general practice among railroad companies and has continued for years with the knowledge and sanction of the Interstate Commerce Commission.

Mr. HALL: I object to the evidence as to the custom in other cities as being immaterial, and the tariff rates or schedules filed with the commission are themselves the best evidence of their contents.

Objection sustained.

Cross-examination by Mr. HALL:

Q. Mr. Wight, Mr. Bruening and Mr. Wolff have their warehouses practically about the same distance from the B. & O. tracks, have they not?

93 A. Within a very short distance of each other; yes, sir.

Q. It is necessary for Mr. Wolff to haul his beer from the B. & O. tracks in the same manner that it is necessary for Mr. Bruening?

A. Well, not exactly according to the testimony. Mr. Wolff says he hauled his beer directly up Try street, and Mr. Bruening has to go around by Water and Ross to Second avenue.

Q. Mr. Bruening could haul his up Try street, too?

A. I think not.

Q. Why not?

A. On account of the grade.

Q. Well, is the grade any heavier for Mr. Bruening than it is for Mr. Wolff?

A. Well, Mr. Wolff would have to cross the Panhandle and Mr. Bruening would have, in addition, to cross Mr. Rea's switch after he crossed the Panhandle track, whereas Mr. Wolff avoids that by going up the hill.

Q. That is not a question of grade; that is a question of route?

A. That is what you asked.

Q. I say the grade would be just the same.

A. The grade; yes, sir.

Q. If it is impossible, as Mr. Bruening has testified, for him to haul up Try street on account of the grade, then it would be equally impossible for Mr. Wolff to haul up there?

A. I did not understand Mr. Bruening to say it would be impossible.

Q. If that be true, it would be to Wolff's disadvantage?

A. It was to Mr. Bruening to cross the track——

94 Q. The only difference between Mr. Bruening and Mr. Wolff is in turning up Try street. Mr. Bruening would have to cross the Panhandle tracks and Mr. Wolff would not?

A. I would not be able to say.

Q. It is a matter of fact that the two warehouses are situated about the same distance from the B. & O. track?

A. Yes, sir.

Q. And you paid cartage to Mr. Bruening of 3½ cents per hundred and you didn't pay any cartage to Mr. Wolff?

A. I don't know Mr. Wolff; had never shipped to him.

Q. You know you didn't pay him any cartage?

A. Yes, sir.

Q. And the reason you paid Bruening cartage and did not pay Wolff cartage was because Bruening had a siding from the Panhandle and Wolff had not?

A. No, sir.

Q. I understood you to say that was the reason. What was the reason?

A. I stated I did not know Mr. Wolf had any shipments, nor was I asked to pay any cartage.

Q. Didn't you state on your direct examination that the reason you paid Mr. Bruening and not Mr. Wolff was because Mr. Bruening had a siding on the Panhandle and Mr. Wolff had not?

A. No, sir; I don't mind of being asked that question. I decline to accept that situation.

Q. You think that your idea in paying Mr. Bruening 3½ cents per hundred for cartage was to make his rate at his ware-

95 house 15 cents per hundred in order to equalize the rate with the Panhandle; because of the Panhandle having a siding to his warehouse and making the rate there 15 cents a hundred?

A. Yes, sir.

Q. Am I right in that?

A. Yes, sir.

Q. Now, the rate charged Mr. Wolff was 15 cents per hundred to the B. & O. siding?

A. I am not aware of charging Mr. Wolff anything, nor am I aware of shipments to Mr. Wolff.

Q. If the rate was 15 cents per hundred to the B. & O. siding, then that rate to his warehouse would be increased by whatever the amount of the cartage was, by whatever amount it cost him to haul it?

A. That is a supposition.

Q. No; that is not a supposition. You are under oath. I am asking you for your answer to that.

A. I can't tell you what I would do if something else would happen.

Q. I am not asking you what you would do.

A. Then I don't understand your question.

Q. I am asking you if Mr. Wolff's beer cost him 15 cents per hundred to the B. & O. siding and he had it carted himself, whether the cost of the beer at his warehouse would not be increased.

A. There is an "if" in it, then. Didn't you say "if"?

Q. Yes, sir; I said "if."

A. That is a supposition, isn't it? I am perfectly willing
96 to answer any question, but I can't tell you what I would do if something else would happen.

Mr. McCLEAVE: He is not asking you what you would do, he is asking you as to the result to Wolff in the case of getting his beer carted to his warehouse.

(The question explained to witness by the court.)

A. I can't tell that. I don't know what the cost is of Mr. Wolff's beer. I never had that question up.

Mr. HALL:

Q. Leaving Mr. Wolff out of the question, you can tell, I suppose, whether, if a man paid 15 cents to your siding and hauled the beer himself, the cost of that beer at his warehouse would not be increased by the cartage?

A. You did not ask me that.

Q. I am asking you that now.

A. Some increase, I suppose. I don't know.

Q. It would cost that amount more to get the beer to his warehouse by shipping it over your road than it would cost Mr. Bruening?

A. Yes, sir; if he came there——

Q. And in such a case there would be a discrimination between the two parties?

A. No, sir; not necessarily.

Q. What do you understand by discrimination?

A. I understand by discrimination where you give one man an advance over another.

97 Q. Exactly. Now, don't you consider it giving one man an advance over another if you deliver one man's beer from your siding and don't deliver another man's?

A. No, sir.

Q. You don't consider that giving one an advantage over another?

A. No, sir; because the circumstances are not similar or may not be similar.

Q. Suppose they are similar?

A. Then it would be a discrimination.

Q. Mr. Bruening is 3½ cents a hundred better off on his beer than if you didn't pay him that cartage, isn't he?

A. No, sir.

Q. He is not?

A. He would ship by the Panhandle. He wouldn't give us the business at all.

Q. I am speaking of beer shipped over your road.

A. Well, we have the same arrangement that the other railroad has.

Q. That is not answering my question. By paying Mr. Bruening 3½ cents a hundred for his cartage you reduce the cost of his beer just that much below what it would cost for shipping it over your road and hauling it himself?

A. If he shipped it over our road and hauled it himself; yes, sir.

Q. Then other people that shipped over your road and hauled it themselves the same distance Mr. Bruening does are just 3½ cents worse off a hundred than Mr. Bruening?

A. If they were situated the same; yes, sir.

98 Mr. McCLEAVE:

Q. Do you know how those deliveries are made by the Panhandle railroad—where the cars are taken when they come in?

A. I understand they are taken in the Grant-street yard and then switched out from there to these different sidings.

Q. And how far is that Grant-street yard from the Bruening place?

A. About half a mile, I should think.

Q. And that delivery is made to the Bruening siding without charge other than the compensation received—the 15 cents?

A. Yes, sir.

Recess.

Afternoon Session.

F. H. BRUENING, being recalled on behalf of defendant, testified as follows on direct examination by Mr. McCleave:

Q. You are familiar with that station on Try street?

A. Yes, sir.

Q. And Mr. Wolff's place?

A. Yes, sir.

Q. How is it that Mr. Wolff can do as he says, hauling from the tracks from the Baltimore & Ohio up Try street—why is it?

A. Mr. Wolff has not got the distance to haul. He has not got over 75 feet, and he unloads his beer at the back entrance
99 to his place. He stops at the steepest place.

Q. And the place where he stops to unload from that place on up to Second avenue is the steepest part of the grade?

A. That is much the steepest part of the grade; yes, sir.

Q. Would it be possible for you to haul up to your place over that grade?

A. It would be impossible to haul up there. The wagons and horses would not last long, the big wagons we have.
Q. And for that reason you haul around by the other route?
A. That is right; yes, sir.

Mr. HALL:

Q. Did I understand you to say he only had about 75 feet to haul?
A. From where the cars generally come in; yes, sir.
Q. Did you ever measure it?
A. I never measured it. I say about that.
Q. How far away from his warehouse is your warehouse?
A. Right across the street.
Q. How wide is that street?
A. I guess it is 70 feet.
Q. Your places are only about 70 feet apart?
A. Yes, sir.

Mr. MCCLEAVE:

Q. To get to your warehouse you have to go up as far as Second avenue?
A. Yes, sir.
100 Q. Wolff does not go up that far?
A. No, sir.
Q. He stops how far between Greenough and Second avenue?
A. He stops about half way from Greenough.
Q. You have to go clear across the block to Second avenue and then across the Panhandle railroad on Second avenue?
A. Yes, sir.

By the COURT:

Q. Which one of those warehouses do you regard as most advantageously located with reference to the Baltimore & Ohio station?
A. Wolff's.

Mr. MCCLEAVE:

Q. That is the closest to the siding?
A. Yes, sir.

F. D. BUSKIRK, a witness produced and sworn on behalf of defendant, testified as follows on direct examination by Mr. McCleave:

Q. Where do you reside?
A. Cincinnati.
Q. What is your business?
A. Traveling freight agent of the Baltimore Ohio Southern.
101 Q. Were you at Mr. Chambers' office with the defendant here at the time he made the arrangement with Mr. Bruening to haul from the Baltimore & Ohio siding to the warehouse?

A. I was. Mr. Chambers had a conversation with Mr. Bruening with regard to his business and asked if it was not possible for the Baltimore Ohio Southwestern and Baltimore & Ohio to have the business. He said if they would put it in his warehouse at a price not exceeding 15 cents a hundred they could have the business.

Q. 15 cents a hundred was the tariff rate?

A. Yes, sir; the tariff rate.

Q. And the Panhandle put it in his warehouse at that rate?

A. Yes, sir; on the siding at his warehouse. Mr. Chambers then called upon the Pittsburgh Transfer Company and they named to him the figure 3½ cents a hundred for hauling that beer from the B. & O. tracks to the Bruening warehouse. They reported that to Mr. Bruening and he said that was satisfactory, and he said, "I would rather do my own hauling; it is my beer and I can handle it, I think, to a better advantage than the transfer company can." And then Mr. Chambers said he would report later.

Q. He wanted the same price as the transfer?

A. Yes, sir; he said if they would pay him the same price as they agreed with the transfer company, that he would haul it.

Q. Was that all the conversation that took place between you?

A. At that time; yes, sir. Mr. Bruening desired us to fix the rate to his house at the same rate as the Panhandle.

102 Cross-examination by Mr. HALL:

Q. Who made that proposition on behalf of the transfer company?

A. I don't know the gentleman's name. It was made in the transfer office.

Q. Isn't it a fact that he offered to do that hauling for two cents?

A. No, sir.

Q. Are you sure of that?

A. To the best of my recollection now, the price named was three and a half cents.

Q. Who else was there when that proposition was made at the transfer company's office?

A. If I remember correctly, Mr. Chambers and I were the only parties there.

Q. Was Mr. Bruening there?

A. I am not sure on that point; I don't think he was.

WILLIAM A. EDEBURN, being duly sworn on behalf of the defendant, testified as follows on direct examination by Mr. McCleave:

Q. You live in Pittsburgh and are an engineer by profession?

A. Yes, sir.

Q. You made a survey of the locality of Second avenue on
103 Try street?

A. Yes, sir; I have.

Q. You made a map of the survey?
A. Yes, sir.

(Plan marked "Ex. No. 2" shown witness.)

Q. Is the plan marked Exhibit No. 2 a map of your survey?
A. Yes, sir; it is.
Q. What section does that show—what place?
A. As shown on this plan, is the Panhandle Railroad track, Third avenue, Second avenue, First avenue, Water street, the Baltimore & Ohio Railroad yards, Try street, and the siding of the Panhandle and their tracks that are upon the ground in that vicinity and the Bruening building and Wolff's and other buildings in that neighborhood.
Q. Does it show the siding of the Panhandle railroad by Mr. Bruening's warehouse?
A. It does; yes.
Q. And the siding of Mr. Rea, leading from the Panhandle railroad down to his house?
A. It does; yes, sir.
Q. Does it show the grade, Mr. Edeburn, leading from the Baltimore & Ohio yard up Try street to Second avenue?
Ans. It does; yes, sir. On the margin of the plan is the profile of the road from the yards to Second avenue.
Q. Along Try street?
A. No, sir—well, yes; along the eastern side of Try street, east of the railroad tracks, the Panhandle Railroad tracks.
Q. Now, what is the grade along Try street from Second avenue down the Baltimore & Ohio yard?
104 A. Beginning at the yard and going up?
Q. Yes, sir.
A. The first grade is 4.6 feet per hundred.
Q. What distance?
A. For a distance of 63 feet; then for a distance of 50 feet more the road is five feet per hundred, and the last rate for 50 feet up Second avenue is 8.2 feet per hundred.
Q. Then for a distance of 50 feet below Second avenue the grade is 8.2?
A. Yes, sir; 8.2 feet.
Q. Now, have you indicated on the map the route described by Mr. Bruening as the direction in which he hauled from the Baltimore & Ohio yard, from Greenough along Water to Ross, to Second avenue, and along Second avenue to the warehouse?
A. I have, with a yellow tint on the plan showing the roadway from the Baltimore & Ohio yards, around, along, and across and under the railroad bridge, the Panhandle Railroad bridge, and along Water street to Ross, to Second avenue, along Second avenue back around in front of Mr. Bruening's warehouse. The measurements are given at these various angles starting at the Baltimore & Ohio yard
Q. Along that route you have a light grade all the way, have you?
A. Yes, sir.

Q. And what distance is it in that direction from the yard to the Bruening warehouse?

A. To the front of the Bruening warehouse it is 1,176 feet from the Baltimore & Ohio yards.

105 Counsel for defendant offer in evidence Exhibit No. 2. Admitted without objection.

HENRY B. REA, JR., being duly sworn on behalf of defendant, testified as follows on direct examination by Mr. McCleave:

Q. What business are you in?

A. I am in the pork business.

Q. Where is your place of business?

A. On Second avenue, near Try.

Q. Have you a private siding connecting your pork-house with the Panhandle railroad?

A. We have.

Q. What is the course of that siding generally, Mr. Rea?

A. It runs off the Panhandle, runs down Try street, and turns into my place.

Q. Is that siding your property?

A. Yes, sir; on Second avenue.

Q. Has Henry Wolff, the man engaged in the beer business on the corner of Second and Try street, at any time used that siding in receiving beer in car-load lots opposite his warehouse?

A. Yes, sir.

Q. How often has he used it?

A. Perhaps a dozen or fifteen times.

Q. During what period?

106 A. I can't fix the date.

Q. Between what years has he used it a dozen or fifteen times?

A. He has not used it within two years.

Q. Within two years?

A. No, sir.

Q. Well, the use he did make of it was by arrangement with you, was it?

A. Yes, sir.

Q. How much did you charge him?

A. I charged him $2 50 a car.

Q. And why has he not used it since, Mr. Rea?

Objected to.

Q. I will ask the witness if he prohibited any further use of it.

A. Yes, sir.

Objected to.

Q. About what time was it you prohibited him from using the siding—how many years ago?

A. Two years ago.

Q. Do you mean May, 1893?

A. I might be mistaken about it being two years ago; it might have been three. We simply made out a bill and went in and collected it.

Q. It may have been three years ago?

A. Yes, sir.

Q. And you have not permitted him to make any use of that since?

107 A. No, sir.

Q. During the time that you did give him permission he did not, you say, altogether unload over 12 or 15 cars?

A. I would say 15 cars.

Q. Do you remember how long he has been in business there—when he went there?

A. I believe he has been there about four years.

Q. He said, I think, he went there in 1890, and this use that you permitted him to make of it—how long was that after he started in the business?

A. I think a year.

Q. And he has not used it any since?

A. No, sir; he has not used it for two or three years.

Q. You had no contract?

A. No, sir; he had no contract with me except for the lease of the property where his lot runs.

Q. You had no contract with him as to the use of the siding?

A. No contract with regard to the siding.

Q. And after he unloaded these twelve or fifteen cars you forbid——

A. Yes, sir.

By the COURT: He stated that once or twice.

Cross-examination by Mr. HALL:

Q. You don't know just when you permitted him or forbid him to use that track any further?

108 A. I cannot fix any positive dates.

Q. Your impression is it was about two years ago?

A. Yes, sir.

Q. You don't know just how many cars he did unload on that prior to June, 1892, either, do you?

A. I think all the cars he unloaded would not have exceeded 15 cars.

Q. Well, do you know, or are you guessing at it?

A. Well, that is the best of my recollection.

Q. You have never looked up your books to find out?

A. Yes, sir; I looked up my books and found no charge for car service. I know I did charge him for it and collected it, but the books don't show anything.

Q. Mr. Wolff testified yesterday that prior to June, 1892, he had unloaded some 20 cars there. Are you willing to say that he was mistaken about that?

A. I think he was mistaken.

Q. Are you sure he was?
A. I am sure he was mistaken about 20 cars.

(Bills handed witness.)

Q. Are those your bills?
A. Yes, sir.
Q. Are they for car service?
A. They are.
Q. Didn't you charge two dollars a car at that time? Isn't that a bill for two cars? Is that for car service?
A. I suppose so.
109 Q. That is for car service?
A. Part of it.
Q. There is the car?
A. Yes, sir. I don't think that is a car, because that charge is four dollars.
Q. Are these last three items for cars? These are all for cars, are they not?

(Bills shown witness.)

A. There are 20 cars.
Q. You are not so sure now that he was mistaken, are you?
A. No; not now from the evidence that you have there—these bills.

Mr. McCLEAVE:

Q. What is the date of the last bill here, Mr. Rea?
A. This is 1890.
Q. I show you this bill of June 2nd, 1891, and ask you, from an *an* examination of the bills, if that is not the last bill you made.
A. Yes, sir.
Q. Has he delivered anything since that date?
A. I think not.

Mr. HALL:

Q. You say you think not. Do you know that he has not?
A. He has not delivered anything on that siding.
Q. Do you know that this bill was the last bill that you rendered?
110 A. That last bill I ain't sure—this $4.
Q. You are not sure that is the last bill you rendered him?
A. The charge was $2.50; that calls for $4.
Q. For all you know, you may have rendered him bills later than this date, though you don't know, do you?
A. I collected the money for rent.
Q. I say, for all you know, you may have rendered him bills for trackage, too, after this, did you not?
A. I couldn't say.

Mr. McCLEAVE:

Q. These bills that you have here call for 20 cars?
A. Yes, sir.

Q Now, have you rendered him any bills since that for car service on that trac*l*—since unloading the twenty cars?

A. No, sir.

Testimony closed.

111 Endorsement: No. 18. October term, 1894. Criminal docket. United States district court, west. dist. of Pa. United States *vs.* C. S. Wight. Testimony. Filed October 7, 1895.

112 *Petition for Writ of Error.*

To the Honorable Joseph Buffington, U. S. district judge for the west. dist. of Penna.:

The petition of C. S. Wight, one of the above-named defendants, by his attorneys, Watson & McCleave, respectfully represents—

That upon the 5th day of November, 1895, the said defendant, in pursuance to a verdict of guilty against him found in your honorable court upon the 15th day of May, in the year 1895, of an infamous crime, more particularly against him charged and set forth in the indictment shown herein, was sentenced by your honorable court to pay a fine to the United States of one thousand dollars, pay the costs of the prosecution herein, and stand committed until the sentence so imposed should be complied with. The said defendant is advised by counsel that in the trial upon the said indictment he was aggrieved by various errors in law then made by the said court, which errors are particularly specified and set forth in his assignment of errors herewith presented and filed.

Your said petitioner is desirous of having the said errors reviewed by the Supreme Court of the United States, and to such end humbly prays your honor to grant him leave to have issued in said cause a writ of error removing the record herein to the Supreme Court of the United States.

And he will ever pray, etc.

WATSON & McCLEAVE,
Att'ys for C. S. Wight, Defendant.

113 And now, November 21st, 1895, writ of error allowed as prayed, and the defendant is ordered to give bail during the pendency of the cause in the sum of $1,000.00.

By the court:

JOS. BUFFINGTON, *U. S. Judge.*

Filed November 21, 1895.

114 Endorsement: U. S. dist. court, west. dist. of Pa. No. 18. October T., 1894. Criminal docket. United States *vs.* C. S. Wight & R. M. Fraser. Petition for writ of error. Filed Nov. 21st, 1895.

115 *Assignments of Error.*

The court erred in the portion of the charge to the jury set forth in the defendant's first bill of exceptions, as follows:

"So that, gentlemen, you see the issue in this case narrows down to the fact, Was there a like and contemporaneous—that is, a service at the same time performed for these two men in the transportation of a like kind of traffic—and was it under substantially similar circumstances and conditions?"

(2.) The court erred in the portion of the charge to the jury set forth in the defendant's second bill of exceptions as follows:

"The purpose of the second section of the interstate-commerce law, gentlemen, was to afford to all shippers who applied for transportation of like character of freight by the railroad company, under similar circumstances and conditions, that they should all of that class receive a uniform rate, that there should be no discrimination between them. The franchises or powers of a railroad company as common carriers empower them to transfer this freight from their terminal station at Cincinnati to their terminal station at Pittsburgh. That was all they could legally be called upon to do. If a shipper in Cincinnati desired a railroad company to go to his place of business and put his freight in drays and carry it to a terminal station, that was a matter which the railroad company as a common carrier was not bound to do. It could do it if it saw fit, but it was a matter of grace and not of right on the part of the railroad; so when the freight was brought to the other terminal the railroad company would have a right, if it saw fit, to deliver the freight in
116 carts or wagons, but that was a matter which it was not called upon as a common carrier to do as a matter of right. For ordinary purposes, the terminals of these roads was the limit of their duty, so far as the transportation was concerned, of their duty as common carrier, unless they saw fit to accept a further duty in the way of delivering the goods off the line of their road—I mean, unless they saw fit to undertake the delivery of the goods by way of carts or wagons."

(3.) The court erred in the portion of the charge to the jury set forth in the defendant's third bill of exceptions as follows:

"In this connection we may say, gentlemen, that the question has been raised here that the beer which was shipped to Mr. Wolf was in a different condition from that shipped to Mr. Bruening. The bills of lading have been given in evidence in regard to the Wolf shipment, and it seems by them that the beer was shipped by the Kauffman Brewing Company to the care of Henry Wolf at Pittsburgh, and to the bills of lading a draft was attached. Those drafts came to the German National Bank of Pittsburgh, and Mr. Wolf then paid the draft, took the bill of lading down to the B. & O. R. R. station, and received the beer there.

We have been asked to say to you that the charge in this case and the service rendered was a service rendered to the Kauffman Brewing Company and not to Henry Wolf, and that Henry Wolf's

name having been laid in the indictment as the person to whom this charge was made, that the facts proven do not agree with the allegations in the indictment, and there could be no conviction in this case because in truth and in fact the freight was paid by the Kauffman Brewing Company. We may say to you, gentlemen, that under these bills of lading, it being stipulated on the bills of
117 lading that the goods were to be delivered to the order of the shipper, and the bills of lading having been endorsed and the freight having been paid by Henry Wolf himself, we cannot so instruct the jury as requested by the defendants; in other words, that, the payment being made by Henry Wolf himself, it was such a charge as would justify the laying of his name in the indictment as the person from whom the defendant company had collected an undue amount of freight from, or charged it, if it did so collect it."

(4.) The court erred in the portion of the charge to the jury set forth in the defendant's fourth bill of exceptions as follows:

"Conceding these men were differently situated, that Bruening had his beer delivered direct from his siding to his warehouse on the Panhandle road, and that Wolf could not have such a delivery, and that Bruening was in such a position from these facts that the Baltimore & Ohio railroad (defendant's road), if untrammeled by the interstate-commerce act, would naturally offer him a lower rate than it would Mr. Wolf in order to get his trade, yet we are constrained to say that this difference between the two shippers, when considered in relation to the Panhandle road, does not constitute such circumstances and conditions as are contemplated in this second section of this act, and that they were not such circumstances and conditions as, apart from all other considerations, warranted the charging of Wolf a larger rate for performing a like service than it did Bruening. These facts—that is, the advantage of location in connection with the Panhandle road—were matters that were personal to Wolf and Bruening, and as regards the defendant's proposition to carry their freight it did not affect the goods to be transported or affect in any way the transportation service to be rendered, so far as this second section is concerned.
118 The second section does not provide for a uniform charge for two different shippers whose business advantages, whose locations, and whose facilities are substantially similar, and who are in those regards under substantially similar circumstances, but what it does give is a uniform rate where the transportation itself is of a like kind of traffic and such transportation is furnished under substantially similar circumstances. Such class of transportation—that is, where it is of a like kind of traffic and where the transportation itself is under substantially similar circumstances and conditions—forms a uniform class upon which the railroad is entitled to put a certain rate of freight, and each and every shipper who asks for the transportation of that particular character—that is, of a like kind of traffic and under substantially similar circumstances and conditions—is entitled to receive such transportation at the uniform rate, no matter what his advantages or disadvantages in other respects may be. It is the freight itself, its quantity, its character,

and such other factors, and the transportation of such freight which are the elements to be considered in determining the class to which it shall be assigned when the rate of tariff is to be collected, and if the traffic is of a like kind and character and the transportation is to be made under substantially similar circumstances and conditions, than the law says the rate shall be uniform with shippers of that class."

(5.) The court erred in the portion of the charge to the jury set forth in the defendant's fifth bill of exceptions as follows:

"Now, what are the facts in reference to the transportation of this beer? What rate—and that is a fact for you to de-
119 termine—what rate, in fact and in substance, under the evidence in this case, was charged Mr. Bruening for the transportation of this beer from Cincinnati to the terminal station at Pittsburgh? Was it the same rate as was charged Mr. Wolf? If it was, then your verdict should be that of not guilty. Or was Mr. Bruening charged a different rate for a like service under substantially similar circumstances and conditions than Mr. Wolf was? You will notice, gentlemen, from the facts that there are two questions for you to determine: First, was there a like service rendered these two men—a like contemporaneous service rendered these two men—in the transportation of a like kind of traffic under similar circumstances and conditions? If there was a like service rendered, then was Mr. Wolf charged for that service more than Mr. Bruening was? If you find both of these facts to be in the affirmative, then your verdict would be a verdict of guilty in manner and form as the defendant stands indicted. If, on the other hand, you find, on the definitions of these terms and instructions as given you by the court, there was not a like service performed for these men, or, if there was a like service, that they were charged the same rate for that service, then your verdict would be that of not guilty."

(6.) The court erred in the portion of the charge to the jury set forth in the defendant's sixth bill of exceptions as follows:

"Mr. Wolf was charged 15 cents, but it is a matter for the jury to determine under all of the evidence what service was performed for Mr. Wolf; where his beer was hauled from; where was it hauled to; what charges *was* made him for that service; was there a like service of the same kind of traffic under the same circumstances performed for Mr. Bruening; if it was, how much was the charge for that service which was like, equivalent to, the service that was performed for Mr. Wolf? And in that connection we
120 will read to you the remarks made in a court of the United States upon a trial of one of these cases of a similar character:

"It is said that — the contract of carriage of a railway—common carrier—is generally understood such transportation of the goods from the warehouse of the railway at the point of shipment to the railway-house at the point of destination; generally the cartage from the railway-house to the storehouse of the consignee is paid by him. If the railway company pays it, the expense of transporting the goods to the place where he can use them is lessened by the

cost of cartage. This is generally equivalent to the railroad company reducing the freight by as much as the cartage would cost the consignee."

(7.) The court erred in its answer to first prayer for instructions presented on behalf of defendant; which prayer and answer are as follows, to wit:

"If the jury believe from the evidence that the Baltimore and Ohio Railroad Company, of which company the defendant is an agent, and the Baltimore & Ohio Southwestern Railway Company were at the time of the alleged offense jointly engaged in the operation of a through line of railroad between Cincinnati and Pittsburgh and in the transportation of freight over the said line were competing for business between said points with the Pittsburgh, Cincinnati & St. Louis Railway Company; also engaged in the operation of a line of railroad between the said points, and that at Pittsburgh the warehouse of the Messrs. Bruenings was situate in proximity to the tracks of the Pittsburgh, Cincinnati & St. Louis railway and had a siding or spur track extending from the main line of the said Pittsburgh, Cincinnati & St. Louis railway to
121 their said warehouse, by means of which the said Pittsburgh, Cincinnati & St. Louis Railway Company delivered freight in car-load lots immediately to the warehouse of the said Bruenings and for which service the said company made no particular or specific charge to the said Bruenings and received no compensation therefor other than the tariff rate established for transportation between Cincinnati and Pittsburgh, and that the Baltimore & Ohio Railroad Company had no such siding connection with the said Bruenings and were unable to deliver freight in car-loads to the warehouse of the said Bruenings by means of a railroad track and the use of locomotive power and were thereby unable to compete with the said Pittsburgh, Cincinnati and St. Louis Railway Company in the transportation of freight from Cincinnati consigned to the said Bruenings, and that defendant, in good faith and for the purpose of equalizing the delivery to the said Bruenings with the delivery made by the Pittsburgh, Cincinnati & St. Louis Railway Company, agreed with the said Bruenings to haul by means of wagons and horses the said freight from the Baltimore & Ohio tracks to the warehouse of the said Bruenings or agreed to pay to the said Bruenings the fair cost of such hauling in case they themselves did the hauling, and that the payments to said Bruenings proved in evidence were made only in pursuance of such agreement, then the defendant is not guilty of the offense charged in the indictment, such payments, if made in good faith, not constituting any rebate, drawback, or other device for char-ing a less rate, but, if unlawful at all, amounting only to an undue preference under the third section of the act to regulate commerce."

Answer. "The defendant is charged in this indictment with receiving a less compensation from Bruenings for the same
122 service than he charged and received from Wolf. What the transaction was is a fact to be determined by the jury upon all the evidence. If they find under the instructions that Wolf was

charged a higher rate than Bruening for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, their verdict should be guilty."

(8.) The court erred in its answer to second prayer for instructions presented on behalf of defendant, which prayer and answer are as follows, to wit:

"If the jury believe from the evidence that the Baltimore and Ohio Railroad Company, of which company the defendant is an agent, and the Baltimore & Ohio South-Western Railway Company were at the time of the alleged offense jointly engaged in the operation of a through line of railroad between Cincinnati and Pittsburgh, and in the transportation of freight over the said line were competing for business between said points with the Pittsburgh, Cincinnati & St. Louis Railway Company, also in the operation of a line of railroad between the said points, and that at Pittsburgh the warehouse of the Messrs. Bruenings was in proximity to the tracks of the Pittsburgh, Cincinnati & St. Louis railway, and had a siding or spur track extending from the main line of the said Pittsburgh, Cincinnati & St. Louis railway to their said warehouse, by means of which the said Pittsburgh, Cincinnati & St. Louis Railway Company delivered freight in car-load lots immediately to the warehouse of the said Bruenings, and for which service the said company made no particular or specific charge to the said Bruenings, and received no compensation therefor other than the tariff rate established for transportation between Cincinnati and Pittsburgh,
123 and that the Baltimore & Ohio Railroad Company had no such siding connection with the said Bruenings, and were unable to deliver freight in car-load to the warehouse of the said Bruenings by means of a railroad track and the use of locomotive power, and were thereby unable to compete with the said Pittsburgh, Cincinnati & St. Louis Railway Company in the transportation of freight from Cincinnati consigned to the said Bruenings, and that defendant, in good faith and for the purpose of equalizing the delivery to the said Bruenings with the delivery made by the Pittsburgh, Cincinnati and St. Louis Railway Company, agreed with the said Bruenings to haul by means of wagons and horses the said freight from the Baltimore & Ohio tracks to the warehouse of the said Bruenings, or agreed to pay the said Bruenings the fair cost of such hauling in case they themselves did the hauling, and that the payments to said Bruening proved in evidence were made only in pursuance of such agreement, then the defendant is not guilty of the offense charged in the indictment, although the jury find also from the evidence that the defendant did charge, demand, collect, and receive from Henry Wolf the full tariff rates on the freight received by him and did not pay or offer to pay for the hauling thereof; provided the jury further find that the said Wolf did not have such siding connection between his warehouse and the tracks of any railroad company engaged in the transportation of freight between Cincinnati, Ohio, and Pittsburgh."

Answer. "Refused."

(9.) The court erred in its answer to third prayer for instructions presented on behalf of defendant, which prayer and answer are as follows, to wit:

"That if the goods shipped from Cincinnati and finally
124 delivered to Henry Wolf were so shipped, consigned under the contract of shipment to the order of the shipper, and possession thereof could only be obtained by said Wolf by paying the draft of the shipper for the price of said goods and lifting the bill of lading thereto attached, then the property in said goods during transportation remained with shipper, and the transportation service done and performed in respect thereof was so done and performed for the said shipper and not for said Wolf, and the defendant is not guilty of the charge laid in the indictment."

Answer. "Refused."

(10.) The court erred in its answer to fourth prayer for instructions presented on behalf of defendant; which prayer and answer are as follows, to wit:

"That under the bills of lading in evidence all the shipments received by Henry Wolf, of which testimony has been given, were made for and on account of the Kaufman Brewing Company, and the transportation service rendered in respect thereto was rendered for the said Kaufman Brewin*ing* Company and not for said Wolf, and the defendant is not guilty of the charge laid in the indictment."

Answer. "Refused."

(11.) The court erred in its answer to fifth prayer for instructions presented on behalf of defendant; which prayer and answer are as follows, to wit:

"That there is no sufficient evidence in the case to justify the jury in finding that in so far as the transportation service performed for Mr. Bruening was like unto the service rendered in re-
125 spect to the goods received by Mr. Wolf the charge made therefor was not the same, and that there was any discrimination between the parties named, so far as the service performed for each was the same."

Answer. "Refused."

(12.) The court erred in its answer to sixth prayer for instructions presented on behalf of defendant; which prayer and answer are as follows, to wit:

"There is no sufficient evidence in the cause that the rate charged, demanded, collected, and received from F. H. Bruening upon beer from Cincinnati to Pittsburgh was a less compensation for the service rendered to said F. H. Bruening in the transportation of said property than was charged to and collected of Henry Wolf for doing for him, the said Wolf, a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions."

Answer. "Refused."

HUGH L. BOND,
WATSON & McCLEAVE,
Att'ys for Plaintiff in Error.

Filed November 21, 1895.

126 Endorsement: U. S. dist. court, west. dist. of Pa. No. 18. October T., 1894. Criminal docket. United States *vs.* C. S. Wight & R. M. Fraser. Assignments of error. Filed Nov. 21, 1895.

127 *Order of Court Extending Time for Filing Transcript.*

And now, to wit, December 19, 1895, on motion of Johns McCleave, of counsel for the said defendant, and for good cause shown, the time for the filing of the transcript of the record surappeal in said case in the Supreme Court of the United States is enlarged and extended for thirty days from the date hereof.

BY THE COURT.

Filed December 19, 1895.

128 Endorsement: No. 18. October term, 1894. Criminal docket. United States district court, western district of Penna. United States *vs.* C. S. Wight. Order of court extending the time for filing transcript surappeal for 30 days. Filed Dec. 19, 1896.

129 UNITED STATES OF AMERICA, }
Western District of Pennsylvania, } *ss:*

In the District Court of the United States for the Western District of Pennsylvania.

We, the undersigned, do hereby acknowledge ourselves indebted to the United States of America in the penal sum of one thousand dollars, lawful money of the United States, to be levied of our goods and chattels, lands and tenements, to the use of the said United States, and to which payment, well and truly to be made, we and each of us do bind ourselves, our heirs, executors, and administrators, and each and ever- of them, jointly and severally, firmly by these presents.

Dated at Pittsburgh this 16th day of January, A. D. 1896.

Now, the condition of this obligation is such that if C. S. Wight, who has been convicted under an indictment charging him — violation of the interstate-commerce act, shall be and appear at a term of the district court of the United States for the western district of Pennsylvania, to be holden at Pittsburgh, when called upon to appear, and not depart the court without leave, then this obligation to be void; otherwise to remain in full force and virtue.

C. S. WIGHT.
JOHNS McCLEAVE.

Taken and acknowledged in open court this 16 day of Jan'y, A. D. 1896.

WM. T. LINDSEY,
Clerk of said Court.

130 [Endorsed:] No. 18. October term, 1896. (Criminal docket.) District court of the United States, western district

of Pennsylvania. United States *vs.* C. S. Wight. Recognizance of bail for defendant's appearance when called upon to appear. Filed the 16 day of Jan'y, 1896. Wm. T. Lindsey, clerk district U. S. court.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

Johns McCleave, of Pittsburgh, surety to the within recognizance of bail, being duly sworn, doth depose and say that he is the owner of real estate, situated within the western district of Pennsylvania, worth the sum of two thousand dollars over and above all his just debts and liabilities.

JOHNS McCLEAVE.

Subscribed and sworn to this 16 day of Jan'y, A. D. 1896, before me—

WM. T. LINDSEY,
Clerk U. S. District Court.

131 *Order of Court Extending Time for Filing Transcript.*

And now, to wit, January 21st, 1896, on motion of Johns McCleave, of counsel for the said defendant, and for good cause shown, the time for the filing of the transcript of the record surappeal in said case in the Supreme Court of the United States is enlarged and extended for thirty days from the date hereof.

BY THE COURT.

Filed January 21st, 1896.

132 Endorsement: No. 18. October term, 1894. Criminal docket. United States district court, western district of Penna. United States *vs.* C. S. Wight. Order of court extending the time for filing transcript surappeal for 30 days. Filed January 21, 1896.

133 *Defendant's Bill of Exceptions.*

Be it remembered that upon the trial of this cause the plaintiff, to maintain issue on its part, introduced in evidence the original copies of classification- nine and ten, September, 1891, to January, 1893, duly filed with the Interstate Commerce Commission, in accordance with the requirements of section 6 of the act to regulate commerce, which classifications are applicable to all the tariffs of the Baltimore & Ohio railroad in effect during the period named and which bear the notation "Governed by official classification."

Also schedule of rates and charges filed with the Interstate Commerce Commission by the Baltimore & Ohio and Baltimore & Ohio Southwestern Railroad Companies, the same being known as the Baltimore & Southwest Railroad joint-rate tariff No. five, taking effect February 1st, 1892, which said rates and charges show, among others, the rates from Cincinnati, Ohio, to Pittsburgh, Pennsylva-

nia, via the Baltimore & Ohio railroad, in force from February 1st, 1892, until the present time.

Mr. F. H. BRUENING was then produced and sworn as a witness on behalf of the United States and testified, on direct examination, that he lived in Pittsburgh, where he was engaged in business as a wholesale dealer in beer during the year 1892; that he purchased his beer in Cincinnati and shipped it to Pittsburgh in car-load lots over the Baltimore & Ohio railroad, for which he paid at the rate of fifteen cents per hundred pound- and part of which he received back. The plaintiff then offered to prove by the witness on the stand that the Baltimore & Ohio railroad and the Baltimore & Ohio Southwestern railroad had established a joint tariff of rates, covering a certain period, which was within the statute of limitations, and that during such period, at various times and upon
134 various dates, they shipped beer to Bruening, and that during the same period—not on the same dates exactly, but during the same period covered by these tariff rates and schedules—they also shipped beer to one Wolf, and that to Bruening they paid a rebate and to Mr. Wolf they did not; to which offer the defendant objected, unless it was proposed to show that the money paid by the Baltimore & Ohio Railroad Co. to the witness was paid on account of and as a rebate on the freight actually charged and paid by him on a specific shipment charged in the indictment on the 27th day of July, 1892, for the reason that the act to regulate commerce makes each transaction within the period a separate offence, separately triable and punishable; which objection the court overruled, stating that the Government was not bound by the specific date fixed in the indictment; to which ruling the counsel for the defendant excepted and a bill was sealed. The witness then testified that of the fifteen cents per hundred which he paid for freight, three and one-half cents per hundred was paid back to him; that settlements were made with him therefor monthly, and that payments were made to him individually by Mr. Galleher, the freight agent of the Baltimore & Ohio railroad.

The witness was then asked the following question: Q. Can you tell from your books how much was paid to you during the months of June, July, August, and September, 1892? to which question the defendant objected for the reason formerly given, that the period of time mentioned in the question was not covered by the indictment; which objection the court overruled, stipulating, however, that this testimony should be followed with evidence of shipments made to Wolf during the same period; defendant excepts and a bill was sealed.

On cross-examination the witness testified that his place of business was at Second avenue and Try street, on the line of the
135 Pan Handle railroad, the tracks of which were within ten feet of his warehouse; that he was connected with their main tracks by a siding about three hundred feet long, which connected with the main tracks about thirty or forty feet from his warehouse; that shipments consigned to him over the Pan Handle road were

delivered to him upon this siding after they had first been taken to the Grant-street yard of the said company, where they were attached to a shifting engine, which placed the cars on the siding in front of his warehouse door, so that he could unload from his car directly into his warehouse, and that for such service in shifting the car- from the yard to the siding and placing them in position for unloading the said railway company charged him nothing in addition to the tariff rate established between Cincinnati and Pittsburgh; that the Baltimore & Ohio railroad had no siding connection with his warehouse, and the topography of the country was such that he could not obtain such siding connection, so that he was compelled to haul beer shipped over that road in wagons to his warehouse from Greenough street, where the cars would be sent, to Water street, along Water to Ross, around Ross to Second and into his alley; that the yard of the Pan Handle railroad at the head of Grant street was about a half a mile from his place; that the three and one-half cents per hundred pounds which was paid him by the Baltimore & Ohio Railroad Company was paid on account of hauling the beer from the Baltimore & Ohio yard by the route described; that this beer was shipped in refrigerator cars; that the three and one-half cents per hundred pounds which was paid by the Baltimore & Ohio Railroad Company to him for hauling the beer from their yard to his warehouse was a fair price for such hauling; that he made this arrangement for the payment of expenses in hauling the beer with an agent of the Baltimore & Ohio Railroad Company named
136 Chambers, who first proposed that the Pittsburgh Transfer Company should haul the beer and said that the transfer company would charge three and one-half cents per hundred, to which the witness made the counter-proposition that if the transfer company could haul the beer at three and one-half cents per hundred he could do it, too, and asked that they let him haul it and pay the three and one-half cents per hundred to him, as he already had the wagons and teams, by the use of which he could haul it at any time he saw fit; that at the time this arrangement was made there was nothing said about the rates from Cincinnati to Pittsburgh, and that the price agreed to be paid was a fair price.

That Henry Wolf was also in the beer business and had his place of business right opposite that of the witness, at the corner of Try street and Second avenue; that he had no delivery siding of his own connecting him with the Pan Handle railroad; that the witness paid the Baltimore & Ohio Railroad Company the full tariff rate on each shipment when he paid his freight, and that at the end of each month he sent in his bill for hauling the beer, the amount of which was ascertained by taking the number of pounds and multiplying it by three and one-half cents per hundred; that there were three lines from Pittsburgh to Cincinnati—the Pan Handle, or P., C., C. & St. L., the Baltomore & Ohio railroad, and the Pittsburgh & Lake Erie railroad; that neither the Baltimore & Ohio nor the Pittsburg & Lake Erie had any siding connection with his warehouse; that the Pan Handle railroad is the only one with which he had such siding connection, so that unless either the Baltimore & Ohio

or the Pittsburgh & Lake Erie would pay the expense of hauling from their stations to his warehouse, he would be compelled to ship his freight by the Pan Handle road.

On redirect examination by the plaintiff the witness stated that prior to the time he made the arrangement with the Balti-
137 more & Ohio railroad to allow him three and one-half cents for cartage he shipped over the Pan Handle road; that subsequent to this agreement he thought he shipped for a short time by the Pan Handle, but that he finally ceased shipping by the Pan Handle road entirely; that notwithstanding the fact that the Pan Handle had a siding right at his warehouse, and that the Baltimore & Ohio was half a mile away, the fact that they paid three and one-half cents for cartage made it more advantageous for him to ship over the Baltimore & Ohio; that sometimes these amount- for cartage were paid to him by Mr. Gallaher, the division freight agent, but that sometimes the payments were made to Mr. Wible, the witness's book-keeper, by whom he did not know.

On recross-examination he testified that the reason he changed his shipments from the Pan Handle to the Baltimore & Ohio was that the Pan Handle had a disadvantage in the fact that in the hot summer his beer lay there on the track; often laid on the siding on the Pan Handle at night, and during the day he could not get at it with his wagons and could not unload it; that they did not give him shipping services at all, and did not treat him right in the prompt movement of cars at the station.

J. G. WIBLE, being produced and sworn as a witness on behalf of the United States, testified on direct examination that he was employed by Bruening during the year 1892 as book-keeper, and thereupon he was asked the following question:

Q. You may state whether or not you have rendered bills to the Baltimore & Ohio Railroad Company for the beer that was shipped to Mr. Bruening over that road monthly.

To which question the defendant objected, unless the question was confined to the shipments charged in the indictment. Objection overruled by the court and bill sealed.

138 And thereupon the witness testified that he did render such bills, and that for the month of June, 1892, there were 1,491,912 pounds charged at three and one-half cents, amounting to $522.17.

For the month of July, 1892, 1,816,419 pounds charged at three and one-half cents, amounting to $635.74.

For the month of August, 1892, 1,834,343 pounds charged at three and one-half cents, amounting to $642.02.

For the month of September, 1892, 1,644,933 pounds charged at three and one-half cents, amounting to $574.75.

And that these amounts were paid sometimes in cash and sometimes by check or voucher; that he received some of these bills himself and sometimes the vouchers were brought to the office, and

that sometimes Stewart Munn, the cashier of the Baltimore & Ohio railroad, collected them.

He was not cross-examined.

HENRY WOLF was then called as a witness on behalf of the plaintiff and testified that he was in business as a wholesale beer dealer in Pittsburgh during 1892; that his warehouse was located at Second avenue and Try street, right across from Mr. Bruening's; that he purchased his beer in Cincinnati; that during the months of June, July, August, and September, 1892, he shipped beer in car-load lots from Cincinnati to Pittsburgh over the Baltimore & Ohio railroad; that this beer was shipped to him by the Kaufmann Brewing Company of Cincinnati, and that he was notified by the Baltimore & Ohio Railroad Company when the beer arrived; that he paid freight on the shipment before he got the beer at the rate of fifteen cents per hundred pounds and received no allowance for cartage.

The plaintiff then offered the following receipts:

Receipt dated June 17, 1892, for 25,760 pounds of beer at fifteen cents, $38.64. Signed Stewart Munn, cashier.

July 18, 1892, 25,625 pounds of beer at fifteen cents, $38.44. Signed Stewart Munn, cashier.

139 July 25, 1892, 25,580 pounds of beer at fifteen cents, $38.37. Signed Stewart Munn, cashier.

July 30, 1892, 25,395 pounds of beer at fifteen cents, $38.00. Signed Stewart Munn, cashier.

August 4, 1892, 25,640 pounds of beer at fifteen cents, $38.46. Signed Stewart Munn, cashier.

August 10, 1892, 25,550 pounds of beer at fifteen cents, $33.33. Signed Stewart Munn, cashier.

August 15, 1892, 25,625 pounds of beer at fifteen cents, $38.43.

August 20, 1892, car 4585 loaded with beer, $39.00. Signed H. H. Epplesheimer.

September 27, 1892, 25,625 pounds of beer at 15 cents, $38.44.

September 1, 1892, 25,745 pounds of beer at fifteen cents, $38.62.

September 10, 1892, 25,625 pounds of beer at fifteen cents, $38.44.

September 15, 1892, 25,550 pounds of beer at fifteen cents, $38.33.

To which offer the defendant objected on the ground that the receipts mentioned covered times not mentioned or referred to or charged in the indictment; which objection the court overruled; defendant excepted and bill was sealed.

On cross-examination the witness testified that the beer was shipped on bills of lading drawn to the order of the Kaufmann Brewing Company and which were attached to drafts, which he was obliged to pay before he could get the property covered by the bill; that in each case it was a shipment to shippers' order, notify witness; that upon being notified by the railroad company he would go to the German National bank, lift the draft, and get possession of the beer; that he could not get possession of the property until he produced the bill, and that the bill was not negotiable; that he

had no private siding connection with the Pan Handle rail-
140 road, but that they had been in the habit of making a delivery to him in car-load lots on the siding owned by Henry Rea; that he had received from the Pan Handle road over this siding about three hundred cars during 1892 and 1895; that previous to July, 1892, he had received in said siding about 27 or 28 cars, for which Mr. Rea charged him $1.25 each; that prior to July, 1892, he had been in business for two years at the same place.

On redirect examination the witness testified that when he hauled his beer from the Baltimore & Ohio railroad to his warehouse he hauled it over the same way that Bruening hauled his, and that the distance from the Baltimore & Ohio yards to the witness's place of business was one hundred and forty yards, and that the distance from the Baltimore & Ohio yards to Bruening's place of business was one hundred and seventy-two yards; that he hauled his beer by a straight line, and that it was possible for Mr. Bruening to do the same thing; that it was not necessary for Bruening to haul his beer by the route Bruening had described, which, however, was easier on his horses, but that witness himself—whose horses were not as strong as Bruening's—hauled his beer through Try street.

On cross-examination the witness testified that the grade up Try street was not steep; that he could haul ten barrels of beer at a load up Try street; that in going that way it was necessary to cross a switch of the Pan Handle railroad.

STEWART MUNN, being produced and sworn on behalf of the plaintiff, testified on direct examination that he was cashier of the Baltimore & Ohio railroad; *taht* the receipts offered in evidence were made by his authority; that he did not make any payments to Mr. Bruening or Mr. Wible during the months of June, July,
August, and September, 1892; that he had not authorized
141 any one to make such payments to Bruening; that there was no record of anything of the kind; that he had no remembrance of it.

C. A. CHAMBERS, a witness produced and sworn on behalf of the plaintiff, testified on direct examination that he lived in Cincinnati in 1892, and was the contracting freight agent of the Baltimore & Ohio and the Baltimore & Ohio Southwestern Railroad Companies; that the arrangement between him and Bruening in regard to the payment of three and one-half cents per hundred pounds of beer was talked over and that the witness visited the Pittsburgh Transfer Company to get their figures for hauling beer from the Baltimore & Ohio and the Baltimore & Ohio Southwestern yards to Mr. Bruening's warehouse; that he then went back and talked to Mr. Bruening about the arrangement, and that Mr. Bruening then said if they could haul it for that that he would like to do it at the same figure himself; *taht* witness reported the matter to R. M. Fraser, general freight agent of the Baltimore & Ohio Southwestern railroad; that he made no report of it *th* Mr. Wight; that witness was not authorized to make any agreement with Mr. Bruening to allow him for

cartage; that he had the conversation with Mr. Bruening under his general authority as contracting freight agent of the system in the interest of the line; that he had no special instruction in regard to Mr. Bruening; that he reported the matter to Mr. Fraser, but never had any conversation in regard to the matter with Mr. Wight; that his first proposition was to Mr. Bruening, who said he would give his business on second day delivery if it did not cost him any more than it did with the Pan Handle; that the witness then, on his own responsibility, went to the transfer company, met some clerk in the office who proposed to take the hauling at three and one-half cents per hundred pounds, which he then went back and submitted to Mr. Bruening; that the purpose of the arrangement was
142 to equalize the Baltimore & Ohio delivery with that which could be obtained from the Pan Handle; that the Pan Handle was delivering by its siding directly into Bruening's warehouse, and that it was not possible for the Baltimore & Ohio to get his trade because they were under the disadvantage of having no facility for delivering by track to the Bruening warehouse unless they paid for the hauling; that the transfer company was in Pittsburgh and engaged in hauling from one part of the town to the other.

On redirect examination the witness testified that he was the contracting freight agent for the Baltimore & Ohio Southwestern railroad and had authority to make contracts such as the one described, but that in a contract which contained *as* such business as this one he usually wanted to confer with his superiors, which he did — this case; that the Baltimore & Ohio Southwestern railroad runs from Cincinnati to Midland City—45 miles—from which point its freight would pass over the Baltimore & Ohio railroad to Pittsburgh; that the witness was contracting agent for the Midland route, of which the Baltimore & Ohio railroad forms a part.

F. H. BRUENING was recalled and sworn as a witness on behalf of the plaintiff and testified on direct examination that the arrangement to which he testified was made with Mr. Chambers in the month of June, 1892.

Witness further testified that he did not haul his beer by way of Try street because he regarded it as impossible to haul it there on account of the steepness of the street and the fact that a siding crossed it, which would kill more horses than anything else would, and for that reason he was compelled to haul by another route.

JAMES T. LEAL, a witness produced and sworn on behalf of the plaintiff, testified on direct examination that he was employed as contracting agent for the Baltimore & Ohio railroad at Pitts-
143 burgh in 1892; that he was present when the arrangement was made in regard to the payment of three and one-half cents per hundred to Mr. Bruening for cartage on his beer; that he never had any conversation with Mr. Wight in regard to the same, but that he believed Mr. Wight had knowledge of the arrangement because of certain correspondence which was submitted in a business way and of which the witness had possession.

J. V. PATTON, a witness called and sworn on behalf of plaintiff, testified that he was the general superintendent of the Baltimore & Ohio railroad; that he knew C. S. Wight, who was the general freight agent; that the duties of the general freight agent of the Baltimore & Ohio Railroad Company are, in a general way, the charge of the freight business and making of rates and routing of freight and making arrangements with affiliated lines for the hauling of such freight and prorates and various duties of that kind; that he was one of the chief officers of the freight department and directly under the traffic manager; that the division freight agents and local freight agents are under his jurisdiction; that freight shipped from Cincinnati to Pittsburgh was shipped by continuous route over the Baltimore & Ohio Southwestern and the Baltimore & Ohio railroads—over the former to Midland City and thence over the Baltimore & Ohio proper.

A. J. ANDERSON, being called and sworn on behalf of the plaintiff, testified on direct examination that he was the secretary to C. S. Wight, the general freight agent, during the months of June, July, August, and September, 1892; that he did not remember having seen the bills rendered by F. H. Bruening against the Baltimore & Ohio railroad for three and one-half cents per hundred on beer shipped by him from Cincinnati to Pittsburgh; that he did not draw checks for the amount of such bills to the order of Mr.
144 Wight, but that he did draw such checks to his own order, which Mr. Wight signed; that the witness got the checks cashed, but did not remember to whom he paid the money; that he could not tell whether he paid the money to Mr. Galleher, but that he did not pay the money to either Mr. Bruening or Mr. Munn; that he did not remember what conversation he had with the party to whom he did pay the money, and that Mr. Wight may have told him to draw the checks.

145 The defendant, to sustain the issues on his part, called STEWART MUNN, a witness who testified that he was cashier of the Baltimore & Ohio Railroad Company and had charge of bills of lading for shipment coming over the railroad. Witness was then shown several receipts that were put in evidence by plaintiffs for moneys paid by Henry Wolf to the Baltimore & Ohio Railroad Company upon beer shipments from Cincinnati to Pittsburgh, and testified that he had examined his files for the original bills of lading for the shipments referred to in the receipts and that he had found them, and thereupon produced them and identified them as being the bills of lading corresponding to shipments set forth in the receipts; that they were all shipments from the Kaufmann Brewing Company to their order for beer that was finally delivered to Henry Wolf; that the bills of lading came attached to drafts, which drafts were lifted at the bank. The defendant then offered in evidence the bills of lading identified by the witness, which were all in the same form and language except as to date and weight of shipment. A copy of one of said bills of lading is as follows, to wit:

146 & 147 Form 654. R. T. M. 7-22-95. 50 M.

The Baltimore and Ohio Southwestern R'y Co.

R. M. Fraser, General freight agent. C. A. Chambers, Contracting freight agent.

Receiving depots, Cincinnati: Second street bet. Fourth and Park streets, J. L. Korn, agent; Harrison Ave. bet. Western Ave. and railroad tracks, F. E. Janowitz, agent.

Bill of Lading No —.

CINCINNATI, O., *Sept.* 13, 1892.

Received from the Kauffman Brewing Co. the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said Baltimore & Ohio Southwestern Railroad Co. agrees to carry to the said destination, if on its road; otherwise to deliver to another carrier on the route to said destination.

It is mutually agreed, in consideration of the rate of freight hereinafter named, as to each carrier of all or any of said property over all or any portion of said route to destination and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained, and which are hereby agreed to by the shipper and by him accepted for himself and his assigns as just and reasonable.

Conditions.

1. No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto by causes beyond its control, or by floods, or by fire from any cause or wheresoever occurring, or by riots, strikes, or stoppage of labor, or by leakage, breakage, chafing, loss in weight, changes in weather, heat, frost, wet, or decay, or from any cause if it be necessary or is usual to carry such property upon open cars.

2. No carrier is bound to carry said property by any particular train or vessel or in time for any particular market or otherwise than with as reasonable dispatch as its general business will permit. Every carrier shall have the right, in case of necessity, to forward said property by any railroad or route between the point of shipment and the point to which the rate is given.

3. No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route nor after said property is ready for delivery to the next carrier or to consignee. The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property, at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which

the rate is based, in either of which events such lower value shall be the maximum price to govern such computation. Claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than thirty days after the delivery of the property or after due time for the delivery thereof, no carrier hereunder shall be liable in any event.

4. All property shall be subject to necessary cooperage and bailing at owner's cost. Each carrier over whose route cotton is to be carried hereunder, shall have the privilege, at its own cost, of compressing the same for greater convenience in handling and forwarding, and shall not be held responsible for unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is an elevator may unless otherwise expressly noted herein, and then if it is not promptly unloaded be there delivered, and placed with other grain of same kind, without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder. No carrier shall be liable for differences in weights or for shrinkage of any grain or seed carried in bulk.

5. Property not removed by the person or party entitled to receive it within twenty-four hours after its arrival at destination, may be kept in the car, depot, or place of delivery of the carrier, at the sole risk of the owner of said property, or may be, at the option of the carrier, removed and otherwise stored at the owner's risk and cost, and there held subject to lien for all freight and other charges. The delivering carrier may make a reasonable charge per day for the detention of any car and for use of track after the car has been held forty-eight hours for unloading, and may add such charge to all other charges hereunder, and hold said property subject to a lien therefor. Property destined to or taken from a station at which there is no regularly appointed agent shall be entirely at risk of owner when unloaded from cars, or until loaded into cars, and when received from or delivered on private or other sidings, shall be at owner's risk until the cars are attached to, and after they are detached from, trains.

6. No carrier hereunder will carry, or be liable in any way for, any documents, specie, or for any article of extraordinary value not specifically rated in the published classifications unless a special agreement to do so, and a stipulated value of the articles are indorsed hereon.

7. Every party, whether principal or agent, shipping inflammable, explosive, or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

8. Any alteration, addition or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be void.

9. If the word "order" is written hereon immediately before or after the name of the party to whose order the property is consigned,

without any condition or limitation other than the name of a party to be notified of the arrival of the property, the surrender of this bill of lading, properly endorsed, shall be required before the delivery of the property at destination. If any other than the aforesaid form of consignment is used herein, the said property may, at the option of the carrier, be delivered without requiring the production or surrender of this bill of lading.

10. Owner or consignee shall pay freight at the rate below stated, and all other charges accruing on said property, before delivery, and according to weights as ascertained by any carrier hereunder, and if upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped, and at the rates and under the rules provided for by published classifications.

11. If all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the conditions, whether printed or written, contained in this bill of lading, including the condition that no carrier or party shall be liable for any loss or damage resulting from the perils of the lakes, sea or other waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances; or from collision, stranding or other accidents of navigation, or from the prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have liberty to call at intermediate ports, to tow and be towed, and to assist vessels in distress, and to deviate for the purpose of saving life or property. And any carrier by water liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property.

Upon all the conditions, whether printed or written, herein contained it is mutually agreed that the rate of freight from Brighton Sta., Ohio, to Pittsburgh, Pa., is to be, in cents per 100 lbs.:

If — times first class.	If first class.	If second class.	If third class.	If fourth class.	If fifth class.	If sixth class.	If special.		And advanced charges.
							Class or commodity.	Rate.	
					15				

Marks, consignees, and destination.	Description of articles.	Weight. (Subject to correction.)
The John Kauffman Brewing Co., c. o. Henry Wolff, Pittsburgh, Pa.	70	1 b'r'ls beer	25,550
	O. R. L.	
	Duly stamped.	
To order shipped.....	S. L. & C.	
	B. & O. S. W.	4,631

F. E. JANOWITZ, *Agent.*
K.

Endorsement: "Kauffman."

148 C. S. WIGHT, the defendant, was then called as a witness in his own behalf and testified that he was the general freight agent of the Baltimore & Ohio Railroad Company, and had been such since 1885; that the said company had a line between Pittsburgh and Cincinnati in connection with the Baltimore & Ohio and Southwestern Railroad Company, and it competed between Cincinnati and Pittsburgh with the Pittsburgh, Cincinnati & St. Louis and the Pittsburgh & Lake Erie railroads, the former of which is the one commonly known as the Pan Handle, and that the Pittsburgh & Lake Erie is a combination, is not a direct through line—it is made up of several other small lines; that the principal competitor of the Baltimore & Ohio between the points named is the Panhandle; that beer was one of the principal articles of carriage between Cincinnati and Pittsburgh; that the Baltimore & Ohio Railroad Company is at a disadvantage in respect to the beer dealers in Pittsburgh on account of the breweries having located their houses on the older railways; consequently whenever the Baltimore & Ohio attempted to do any business here it was placed at a disadvantage because of not being able to reach the warehouses of the principal brewers of the town; that the dealers in Pittsburgh were principally located on the Panhandle tracks or adjacent thereto in the neighborhood of Try street and Second avenue, and some were around on the freight tracks; that those situated on the Panhandle railroad had most of them siding connection with the railroad for delivery; that Mr. Bruening's warehouse was situated on the Panhandle railroad, and had a siding connection with it, and had no connection with the Baltimore & Ohio tracks; that it would be a physical impossibility to make a connection between that railroad and that warehouse; that the Panhandle railroad had no track to Mr. Wolf's warehouse; that the Panhandle made deliveries on Bruening's siding to his warehouse; that it did not make
149 similar deliveries to Henry Wolf, because he had no siding; that in order for the Baltimore & Ohio Company to get a a part of Mr. Bruening's business it had to deliver the freight at the same point as did the Panhandle railroad, for the same compensation, and that point was at his warehouse; that in order to do this the Baltimore & Ohio Company would have to pay the cartage from its tracks to Bruening's warehouse to put itself on an equality with the Panhandle at the same rate.

That this allowance for cost of hauling to Bruening's warehouse was not in any sense a drawback or rebate or device to do this transportation for Mr. Bruening for less compensation than for Mr. Wolf; that the company was compelled to make the same rate and deliver the freight at the same charge or it could not compete for the business; that the question came up through the general freight agent, Mr. Fraser, advising Mr. Wight, the witness, that he had endeavored to secure some of these shipments and had been unable to do so, and sent his representative to Pittsburgh; that the witness ascertained the reason and found out what was necessary to equalize the two companies on the deliveries; that Mr. Fraser stated to witness that though under the tariff arrangement he could make

arrangements without consultation, that as the delivery was in Pittsburgh he preferred to consult with witness; that witness then looked into the matter to satisfy himself that the company was justified in taking Mr. Bruening's proposition, as far as Mr. Bruening's beer was concerned, and then notified Mr. Fraser that the Baltimore & Ohio Company would join in that arrangement; that the correspondence commenced in May and the arrangement was made early in June, 1892; that the other shipper of beer on the Baltimore & Ohio line was the Kaufman Brewing Company of Cincinnati; that witness did not know Henry Wolf at that time.

150 The witness further testified that Mr. Bruening and Mr. Wolf had their warehouses practically within a short distance of each other and about the same distance from the Baltimore & Ohio tracks; that he had paid Mr. Bruening 3½ cents per 100 lbs. cartage, and that he did not pay any cartage to Mr. Wolf; that he did not know Mr. Wolf; that his idea in paying Mr. Bruening 3½ cents per 100 lbs. for cartage was to make his rate at the warehouse 15 cents per 100 lbs., in order to equalize the rate with the Panhandle because the Panhandle had a siding at his warehouse and made the rate there of 15 cents per hundred pounds; that if a man paid 15 cents per hundred to the Baltimore & Ohio siding in the freight yard and hauled it himself to his warehouse the cost of his beer at the warehouse would be increased by the cartage; that in such a case there would not necessarily be a discrimination between the parties; that witness understood by discrimination where you gave one party an advantage over another, and did not consider it as giving one man an advantage over another if he delivered one man's beer from the Baltimore & Ohio siding and did not deliver another man's because the circumstances were not similar or may not be similar; that if they were similar it would be discrimination; that Mr. Bruening was not 3½ cents a hundred better on his beer than if he was not paid his cartage, because he would ship by the Panhandle and the Baltimore & Ohio would not get his business at all; that he would be if he shipped it over the Baltimore & Ohio and hauled it himself; that other people who shipped over the Baltimore & Ohio and hauled it themselves the same distance as Mr. Bruening did would be 3½ cents per 100 worse off than Mr. Bruening if they were situated the same; that the cars coming over the Panhandle railroad are first taken to the Grant-street yard and then switched out from there to these different warehouse sidings; that the Grant-street yard is about a half a mile from Mr. Bruen-

151 ing's warehouse, and that delivery by the Panhandle was made to Mr. Bruening's siding without charge other than the compensation received, 15 cents per 100.

F. D. Buskirk was then called as a witness on behalf of the defendant and testified that he was travelling freight agent of the Baltimore & Ohio Southwestern Railroad Company; that he was present with Mr. Chambers at the time he made the arrangement with Mr. Bruening to haul from the Baltimore & Ohio siding to

his warehouse; that Mr. Chambers had a conversation with Mr. Bruening with regard to his business and asked him if it was not possible for the Baltimore & Ohio Southwestern and Baltimore & Ohio to have the business; that Mr. Bruening said that if they would put it in his warehouse at a price not exceeding 15 cents per 100 they could have the business; that 15 cents per 100 was the tariff rate; that the Panhandle put it in his warehouse at that rate or on the siding at his warehouse; that Mr. Chambers then called upon the Pittsburgh Transfer Company, and they named him the figure of 3½ cents per 100 for hauling the beer from the Baltimore & Ohio tracks to Mr. Bruening's warehouse; that they reported that to Mr. Bruening and Mr. Bruening said that was satisfactory, and said, "I would rather do my own hauling; it is my beer and I can handle it, I think, to a better advantage than the transfer company can;" that then Mr. Chambers said he would report later; that Mr. Bruening said he wanted the same price as the transfer company; that he said if they would pay him the same price as they agreed with the transfer company, he would haul it; that Mr. Bruening desired witness and Mr. Chambers to fix the rate to his house at the same rate as the Panhandle.

Henry B. Rea, Jr., was then called as a witness on behalf of the defendant and testified that he was in the pork business on Second avenue, near Try street, and that a siding connected his pork-house with the Panhandle railroad, which siding runs off the
152 Panhandle, down Try street, and then turns into his place; that said siding was his property, on Second avenue; that Henry Wolf engaged in the beer business at the corner of Second avenue and Try street; had at times used the siding in receiving beer in car-load lots opposite his warehouse—perhaps a dozen or fifteen times—but he had not used it within two years; that the use he made of it was by arrangement with witness; that witness charged him $2½ per car, and then prohibited any further use of it about two years ago—it might have been three years—and had not permitted him to make any use of it since. During that time that witness gave him permission he did not unload over twelve to fifteen cars; that he (Wolf) has been in business about four years; that witness had no contract with him as to the use of the siding—the last bill was made June 2nd, 1891—and that he has not delivered anything on that siding since that date.

The defendant then closed his case. This is substantially all the evidence offered by the parties.

And thereupon the defendant prayed the court to charge the jury as follows, to wit:

First. If the jury believe from the evidence that the Baltimore & Ohio Railroad Company, of which company the defendant is an agent, and the Baltimore & Ohio Southwestern Railway Company were at the time of the alleged offence jointly engaged in the operation of a through line of railroad between Cincinnati and Pittsburgh and in the transportation of freight over the said line were competing for business between said points with the Pittsburgh, Cincin-

nati & St. Louis Railway Company, also engaged in the operation of a line of railroad between the said points, and that at Pittsburgh the warehouse of the Messrs. Bruening was situate in
153 proximity to the tracks of the Pittsburgh, Cincinnati & St. Louis railway, and had a siding or spur track extending from the main line of the said Pittsburgh, Cincinnati & St. Louis railway to their said warehouse, by means of which the said Pittsburgh, Cincinnati & St. Louis Railway Company delivered freight in car-load lots immediately to the warehouse of the said Bruenings, and for which service the said company made no particular or specific charge to the said Breunings and received no compensation therefor other than the tariff rate established for transportation between Cincinnati and Pittsburgh, and that the Baltimore & Ohio Railroad Company had no such siding connection with the said Bruenings, and were unable to deliver freight in car-loads to the warehouse of the said Bruenings by means of a railroad track and the use of locomotive power, and were thereby unable to compete with the said Pittsburgh, Cincinnati & St. Louis Railway Company in the transportation of freight from Cincinnati consigned to the said Bruenings, and that defendant, in good faith and for the purpose of equalizing the delivery to the said Bruenings with the delivery made by the Pittsburgh, Cincinnati & St. Louis Railway Company, agreed with the said Bruenings to haul by means of wagons and horses the said freight from the Baltimore & Ohio tracks to the warehouse of the said Bruenings or agreed to pay to the said Bruenings the fair cost of such hauling in case they themselves did the hauling, and that the payments to the said Bruenings proved in evidence were made only in pursuance of such agreement, then the defendant is not guilty of the offence charged in the indictments, such payments, if made in good faith, not constituting any rebate, drawback, or other device for charging a less rate, but, if unlawful at all, only amounting to an undue preference under the third section of the act to regulate commerce.

154 Answer. The defendant is charged in this indictment with receiving a less compensation from Bruenings for the same services than he charged and received from Wolf. What the transaction was is a fact to be determined by the jury upon all the evidence. If they find under the instructions that Wolf was charged a higher rate than Bruening for a like and contemporaneous service on the transportation of a like kind of traffic under substantially similar circumstances and conditions, their verdict should be guilty.

To which answer the defendant excepts, and the same is noted 14th May, 1895.

JOS. BUFFINGTON, *D. J.* [L. S.]

Second. If the jury believe from the evidence that the Baltimore & Ohio Railroad Company, of which company the defendant is an agent, and the Baltimore & Ohio Southwestern Railway Company were at the time of the alleged offence jointly engaged in the operation of a through line of railroad between Cincinnati and Pittsburgh

and in the transportation of freight over the said line were competing for business between said points with the Pittsburgh, Cincinnati & St. Louis Railway Company, also engaged in the operation of a line of railroad between said points, and that at Pittsburgh the warehouse of Messrs. Bruenings was situate in proximity to the tracks of the Pitisburgh, Cincinnati & St. Louis railway and had a siding or spur track extending from the main line of the said Pittsburgh, Cincinnati & St. Louis railway to their said warehouse, by means of which the said Pittsburgh, Cincinnati & St. Louis Railway Company delivered freight in car-load lots immediately to the warehouse of the said Buenings, and for which service the said company made no particular or specific charge to the said Bruenings and received no compensation therefor other than the tariff rate established for transportation between Cincinnati and Pittsburgh, and
155 that the Baltimore & Ohio Railroad Company had no such siding connection with the said Bruenings, and were unable to deliver freight in car-loads to the warehouse of the said Bruenings by means of a railroad track and the use of locomotive power, and were thereby unable to compete with the said Pittsburgh, Cincinnati & St. Louis Railway Company in the transportation of freight from Cincinnati consigned to the said Bruenings, and that defendant, in good faith and for the purpose of equalizing the delivery to the said Bruenings with the delivery made by the Pittsburgh, Cincinnati & St. Louis Railway Company, agreed with the said Bruenings to haul by means of wagons and horses the said freight from the Baltimore & Ohio tracks to the warehouse of the said Bruenings, or agreed to pay to the said Bruenings the fair cost of such hauling in case they themselves did the hauling, and that the payments to said Bruenings proved in evidence were made only in pursuance of such agreement, then the defendant is not guilty of the offense charged in the indictment, although the jury find also from the evidence that the defendant did charge, demand, collect, and receive from Henry Wolf the full tariff rates on the freight received by him, and did not pay or offer to pay for the hauling thereof, provided the jury further find that the said Wolf did not have such siding connection between his warehouse and the tracks of any railroad company engaged in the transportation of freight between Cincinnati, Ohio, and Pittsburgh.

Answer. Refused.

To the refusal of this point the defendant excepts, and an exception is noted.

JOS. BUFFINGTON, *D. J.* [L. S.]

14th May, 1895.

156 Third That if the goods shipped from Cincinnati and finally delivered to Henry Wolf were so shipped, consigned under the contract of shipment to the order of the shipper, and possession thereof could only be obtained by said Wolf by paying the draft of the shipper for the price of said goods and lifting the bill of lading thereto attached, then the property in said goods during transportation remained with shipper, and the transportation

service done and performed in respect thereof was so done and performed for the said shipper and not for said Wolf, and the defendant is not guilty of the charge laid in the indictment.

Answer. Refused.

To the refusal of this point —, and an exception is noted.

JOS. BUFFINGTON, *D. J.* [L. S.]

14th May, 1895.

Fourth. That under the bills of lading in evidence all the shipments received by Henry Wolf, of which testimony has been given, were made for and on account of the Kaufman Brewing Company, and the transportation service rendered in respect thereto was rendered for the said Kaufman Brewing Company and not for said Wolf, and the defendant is not guilty of the charge laid in the indictment.

Answer. Refused.

To the refusal of this point the defendant excepts, and an exception is noted.

JOS. BUFFINGTON, *D. J.* [L. S.]

14th May, 1895.

157 Fifth. That there is no sufficient evidence in the case to justify the jury in finding that, in so far as the transportation service performed for Mr. Bruening was like unto the service rendered in respect to the goods received by Mr. Wolf, the charge made therefor was not the same, and that there was any discrimination between the parties named, so far as the service performed for each was the same.

Answer. Refused.

To the refusal of this point the defendant excepts, and an exception is noted.

JOS. BUFFINGTON, *D. J.* [L. S.]

14th May, 1895.

Sixth. There is no sufficient evidence in the cause that the rate charged, demanded, collected, and received from F. H. Bruening upon beer from Cincinnati to Pittsburgh was a less compensation for the service rendered to the said F. H. Bruening in the transportation of said property than was charged to and collected of Henry Wolf for doing for him, the said Wolf, a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

Answer. Refused.

To the refusal of this point the defendant excepts, and an exception is noted.

JOS. BUFFINGTON, *D. J.* [L. S.]

14th May, 1895.

158 And after arguments of counsel to the jury the court charged the jury as follows:

"GENTLEMEN OF THE JURY: In this case the defendant, C. S. Wight, is charged upon an indictment containing a single count

alleging that he is guilty of an offence under the second section of the interstate-commerce law, for an unlawful discrimination in charges made upon freight. The case involves a very narrow margin for the determination of the jury. While the case is criminal in name, it is in substance a dispute of a civil nature, to wit, the meaning of the second section of the interstate-commerce law *is* as applied to the facts of this case.

It seems that in 1892 Mr. Bruening, a wholesale dealer in beer in this city, had a warehouse upon a private siding connected with the main line of the P., C., C. & St. Louis R. R. Over this line he shipped his beer from Cincinnati, in the adjoining State of Ohio, to Pittsburgh. The beer was brought to the yards of the P., C., C. & St. L. R. R., and from there shifted to the doors of his warehouse and taken direct from the cars into the warehouse. The tariff rate charged for this entire service by the P., C., C. & St. L. R. R. was 15 cents per hundredweight in car-load lots. The Baltimore & Ohio railroad, in connection with the B. & O. S. W. R. R., was one of two other competing lines between Cincinnati and Pittsburgh, and in order to obtain the business of Mr. Bruening it was proposed to Bruening that it would deliver beer from Cincinnati to his warehouse at the same rate, namely, 15 cents per 100 lbs. The freight agent of the B. & O. S. W. R. R. went to the Pittsburgh Transfer Company and obtained a rate from them of 3½ cents per 100 lbs. for carting the beer from the B. & O. R. R. siding to Mr. Bruening's warehouse. The B. & O. R. R. had
159 no rail connection with the Bruening warehouse and it was a physical impossibility to make one. The established rate for carrying beer from Cincinnati to Pittsburgh over the B. & O. R. R. was also 15 cents per 100 lbs. Mr. Bruening suggested to the railroad people that he might as well haul the beer himself from the station as have it done by a third party, and it was thereupon agreed that Mr. Bruening should pay 15 cents per 100 lbs., the regular tariff rate for beer in car-load lots, and that he should do the hauling himself, and for that hauling he should be paid at the rate of 3½ cents per 100 lbs. This indictment generally alleges that the B. & O. R. R. or, rather, Mr. Wight, the defendant, who was its general freight agent, transported this beer from Cincinnati to Pittsburgh, in fact, for 11½ cents per 100 lbs., the contention of the Government being that the defendant agreed to transport the beer to the warehouse, and that the transportation of the beer from the siding to the warehouse was worth 3½ cents per hundredweight; so that in fact what was really charged to Mr. Bruening was a rate of 11½ cents per hundredweight between Cincinnati and the terminus of the road here at the B. & O. R. R. siding.

Now, the Government goes further and alleges that at the same time the B. & O. R. R. was furnishing this transportation to Mr. Bruening for 11½ cents per 100 lbs. it charged Henry Wolf, who was another shipper of the same commodity, in like lots, under similar circumstances and conditions, a rate of 15 cents per 100 lbs.

We may say to you in that connection, gentlemen, that Mr. Wolf, as appears from the evidence in this case, was the lessee of a ware-

house situated across the street and within sixty or seventy feet of Mr. Bruening's. He had no railroad connection of his own with the P., C., C. & St. L. R. R. It appears that some time previous he had used the switch of Mr. Rea, who charged him a price per car
160 for passing his cars over it to the warehouse; that afterwards he had forbidden him using it at all, and the contention of the defendant in this case, very frankly made upon the stand by Mr. Wight, is that under his understanding and construction of the law as embodied in this second section of the interstate-commerce law that he had a right to take into consideration the circumstances and conditions of the two shippers; that inasmuch as Mr. Wolf had no connection whatever with the P., C., C. & St. L. R. R. and was forced to cart his beer, no matter by what route he obtained it, that there was no injustice or difference of rate, in fact, in giving Bruening, who had a siding upon the P., C., C. & St. L. R. R., a like rate upon the B. & O. R. R. In other words, that his circumstances and conditions were such that Mr. Wight was justified in not only agreeing to transport the beer to Pittsburgh, but in going further and paying for the transportation of the beer from the siding to the warehouse itself. So that, gentlemen, you see the issue in this case narrows down to the fact, was there a like and contemporaneous—that is, a service at the same time performed for these two men in the transportation of a like kind of traffic, and was it under substantially similar circumstances and conditions? This leaves, gentlemen, the question open for the court to instruct you as to what the meaning of these terms are in connection with the facts which you are called upon to pass upon in this case.

The purpose of the second section of the interstate-commerce law, gentlemen, was to afford to all shippers who applied for transportation of like character of freight by the railroad company, under similar circumstances and conditions, that all of that class should receive a uniform rate; that there should be no discrimination between them. The franchises or powers of a railroad company as common carriers empower them to transfer freight from
161 their terminal station at Cincinnati to their terminal station at Pittsburgh. That was all they could legally be called upon to do.

If a shipper in Cincinnati desired a railroad company to go to his place of business and put his freight in drays and carry it to a terminal station, that was a matter which the railroad company as a common carrier was not bound to do. It could *to* it if it saw fit, but it was a matter of grace and not of right on the part of the railroad. So when the freight was brought to the other terminal the railroad company would have a right, if it saw fit, to deliver the freight in carts or wagons, but that was a matter which it was not called upon as a common carrier to do as a matter of right. For ordinary purposes the terminals of these roads was the limit of their duty—so far as the transportation was concerned—of their duty as a common carrier, unless they saw fit to accept a further duty in the way of delivering these goods off the line of their road—I mean, unless they saw fit to undertake the delivery of the goods by carts or wagons.

Now, gentlemen, were these men, Bruening and Wolf, rendered a like service? Did they have a like kind of traffic, and was the transportation made under substantially similar circumstances and conditions? It is admitted in this case—or at least there is no conflict in the testimony—that the beer was shipped in car-load lots; that it was shipped from the same station—Brighton station, in Cincinnati—and was received at the same terminal station here by both men.

In this connection we may say that the question has been raised that the beer which was shipped to Mr. Wolf was in a different condition from that shipped to Mr. Bruening. The bills of lading covering the Wolf shipments have been given in evidence.
162 It seems by them that the beer was shipped by the Kaufman Brewing Company of Cincinnati to the care of Henry Wolf, at Pittsburgh, and to the bills of lading a draft was attached. Those drafts came to the German National bank, in Pittsburgh, and Mr. Wolf then paid the draft, took the bill of lading down to the B. & O. R. R., and received the beer there. We have been asked to say to you that the charge in this case and the service rendered was a service rendered to the Kaufman Brewing Company and not to Henry Wolf, and that Henry Wolf's name having been laid in the indictment as the person to whom this charge was made, that the facts proven do not agree with the allegations in the indictment, and there could be no conviction in this case, because in truth and in fact the freight was paid by the Kaufman Brewing Company. We may say to you, gentlemen, that under those bills of lading, it being stipulated on the bills of lading that the goods were to be delivered to the order of the shipper, and the bills of lading having been endorsed and the freight having been paid by Henry Wolf himself, we cannot so instruct the jury as requested by the defendant; in other words, we charge you that, the payment being made by Henry Wolf himself, it was such a charge as would justify the laying of his name in the indictment as the person from whom the defendant's company had collected an undue amount of freight from, or charged it, if it did so collect it.

Now, gentlemen, did the situation of these parties as they were upon the P., C., C. & St. L. R. R.—as their warehouses were located there—were those such circumstances and conditions as justified the defendant charging a different rate for the transportation of these car-load lots of beer? The act of Congress says: "If any common carrier subject to the provision- of this act shall directly or indirectly, by any special rate, rebate, drawback, or other
163 device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers and property subject to the provision- of this act than it charges, demands, collects, or receives from any other person or persons for doing for him or them" (now mark you) "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination."

Now, were these facts in reference to the situation of the parties on this Panhandle road the circumstances and conditions which are contemplated by this second section of the act? Conceding these men were differently situated; that Bruening had his beer delivered direct from his siding to his warehouse on the Panhandle road, and that Wolf could not have such a delivery, and that Bruening was in such a position from these facts that the Baltimore & Ohio railroad (the defendant's road), if untrammeled by the interstate-commerce act, would naturally offer him a lower rate than it would Mr. Wolf in order to get his trade, yet we are constrained to say that this difference between the two shippers, when considered in relation to the Panhandle road, does not constitute such circumstances and conditions as are contemplated in this second section of this act; that they were not such circumstances and conditions as, apart from all other considerations, warranted the charging of Wolf a larger rate for performing a like service than it did Bruening. These facts—that is, the advantage of location in connection with the Panhandle road—were matters personal to Wolf and Bruening and, as regards the defendant's proposition to carry their freight,
did not affect the goods to be transported or the transporta-
164 tion service to be rendered, so far as this second section is
concerned.

The second section does not provide for a uniform charge for two different shippers, whose business advantages, whose locations, and whose facilities are substantially similar, and who are in those regards under substantially similar circumstances, but what it does give is a uniform rate where the transportation itself is of a like kind of traffic, and such transportation is furnished under substantially similar circumstances and conditions. Such class of transportation—that is, where it is of a like kind of traffic and where the transportation itself is under substantially similar circumstances and conditions—forms a uniform class, upon which the railroad is entitled to put a certain rate of freight, and each and every shipper who asks for the transportation of that particular character—that is, of a like kind of traffic and under substantially similar circumstances and conditions—is entitled to receive such transportation at the uniform rate, no matter what his advantages or disadvantages in other respects may be. It is the freight itself—its quantity, its character, and such other factors—and the transportation of such freight which are the elements to be considered in determining the class to which it shall be assigned when the rate of tariff is to be fixed, and if the traffic is of a like kind and character and the transportation is to be made under substantially similar circumstances and conditions, then the law says the rate shall be uniform to shippers of that class. To hold the law otherwise would, to our mind, sap it of its usefulness.

If the circumstances and conditions referred to in the act are
165 to embrace all the personal factors of the business conditions,
locations, facilities, and the like of individual shippers, then we introduce elements of such uncertainty, probably ill judgment, and possible favoritism that confusion and injustice would result.

As a matter of policy, expediency, and business sagacity, it may well be that the defendant company had good reason for treating the shipper, Bruening, in the way it did, and that if it did not he would, from the very fact of his warehouse being more advantageously situated upon another line, receive his freight by that route. If the railroad company wished to establish a rate to meet those conditions, it had a right to do so in Mr. Bruening's case or for the character of business which they were seeking to carry, but when it established that rate it must be a uniform rate to all other persons who asked it to transport the same character of traffic at the same time, under substantially similar circumstances and conditions. Now, gentlemen, as we view this case, the fact that Mr. Bruening had railroad facilities upon the Panhandle road more advantageous than Mr. Wolf had is not in itself such a fact and circumstance as is contemplated in this second section and is not to be considered as justifying a different rate—the making of a different rate for Mr. Bruening and for Mr. Wolf—if such a rate was in fact made.

Now, what are the facts in reference to the transportation of this beer? What rate—and that is a fact for you to determine—what rate, in fact and in substance, under the evidence in this case, was charged Mr. Bruening for the transportation of this beer from Cincinnati to the terminal station at Pittsburgh? Was it the same rate as was charged Mr. Wolf? If it was, then your verdict should be that of not guilty. Or, was Mr. Bruening charged a different rate for a like service, under substantially similar circumstances and conditions, than Mr. Wolf was? You will notice, gentlemen, from the facts that there are two questions for you to determine: First,
166 was there a like service rendered these two men—a like—contemporaneous service rendered these two men—in the transportation of a like kind of traffic under similar circumstances and conditions? If there was a like service rendered, then was Mr. Wolf charged for that service more than Mr. Bruening was? If you find both these facts to be in the affirmative, then your verdict would be a verdict of guilty in the manner and form as the defendant stands indicted. If, on the other hand, you find, on the definitions of these terms and instructions as given you by the court, there was not a like service performed for these men, or if there was a like service, that they were charged the same rate for that service; then your verdict would be that of not guilty."

At the close of the charge, counsel for defendant said to the court that both Wolf and Bruening had been charged and had paid the same freight, so far as the service performed for each was the same, viz., fifteen cents per hundred, and asked the court to so instruct the jury; whereupon the court added:

Mr. Wolf was charged fifteen cents; but it is a matter for the jury to determine, under all the evidence, what service was performed for Mr. Wolf—where was his beer hauled from, where was it hauled to, what charge was made him for that service, was there a like service of the same kind of traffic, under the same circumstances, performed for Mr. Bruening; if it was, how much was the charge for

that service which was like, equivalent to, the service that was performed for Mr. Wolf? In that connection we will read to you the remarks made in a court of the United States upon a trial of one of these cases of a similar kind:

"It is said that — the contract of carriage of a railway, common carrier, is generally understood such transportation of the goods from the warehouse of the railway at the point of shipment to the railway-house at the point of destination. Generally, the
167 cartage from the railway-house to the storehouse of the consignee is paid by him. If the railway company pays it, the expense of transporting the goods to the place where he can use them is lessened by the cost of cartage. This is generally exactly equivalent to the railroad company reducing the freight by as much as the cartage would cost the consignee."

168 *Exceptions to Charge of the Court.*

First. The defendant excepts, by his counsel, to the following portion of the charge of the court to the jury, viz:

"So that, gentlemen, you see the issue in this case narrows down to the fact, was there a like and contemporaneous—that is, a service at the same time performed for these two men in the transportation of the like kind of traffic, and was it under substantially similar circumstances and conditions?"

And at his request the court notes an exception thereto May 15th, 1895.

JOS. BUFFINGTON, *D. J.* [SEAL.]

Second. The defendant excepts, by his counsel, to the following portion of the charge of the court to the jury, viz:

"The purpose of the second section of the interstate-commerce law, gentlemen, was to afford to all shippers who applied for transportation of like characters of freight by the railroad company, under similar circumstances and conditions, that they should all of that class receive a uniform rate, that there should be no discrimination between them. The franchises or powers of a railroad company as common carriers empower them to transfer this freight from their terminal station at Cincinnati to their terminal station at Pittsburgh; that was all they could legally be called upon to do. If a shipper in Cincinnati desired a railroad company to go to his place of business and put his freight in drays and carry it to a terminal station, that was a matter which the railroad company as a common carrier was not bound to do. It could do it if it saw fit, but it was a matter of grace and not of right on the part of the shipper; so when the freight was brought to the other termi-
169 nal the railroad company would have a right, if it saw fit, to deliver the freight in carts or wagons; but that was a matter which it was not called upon as a common carrier to do as a matter of right. For ordinary purposes, the terminals of these roads *was* the limit of their duty, so far as the transportation was concerned—of their duty as a common carrier—unless they saw fit to

accept a further duty in the way of delivering the goods off the line of their road—I mean unless they saw fit to undertake the delivery of the goods by way of carts or wagons."

And at his request the court notes an exception thereto.

JOS. BUFFINGTON, *D. J.* [L. S.]

Third. The defendant excepts, by his counsel, to the following portion of the charge of the court to the jury, viz:

"In this connection we may say, gentlemen, that the question has been raised here that the beer which was shipped to Mr. Wolf was in a different condition from that shipped to Mr. Bruening. The bills of lading have been given in evidence in regard to the Wolf shipment, and it seems by them that the beer was shipped by the Kaufman Brewing Company to the care of Henry Wolf, at Pittsburgh, and to the bills of lading a draft was attached. These drafts came to the same bank here, the German National Bank of Pittsburgh, and Mr. Wolf then paid the draft, took the bill of lading down to the B. & O. R. R. station and received the beer there. We have been asked to say to you that the charge in this case and the service rendered was a service rendered to the Kaufman Brewing Company and not to Henry Wolf, and that Henry Wolf's name having been laid in the indictment as the person to whom this charge was made, that the facts proven do not agree with the allegations in the indictment, and there could be no conviction
170 in this case, because in truth and in fact the freight was paid by the Kaufman Brewing Company. We may say to you, gentlemen, that under these bills of lading, it being stipulated on the bills of lading that the goods were to be delivered to the order of the shipper and the bills of lading having been endorsed and the freight having been paid by Henry Wolf himself, we cannot so instruct the jury, as requested by the defendants; in other words, that the payment being made by Henry Wolf himself, it was such a charge as would justify the laying of his name in the indictment as the person whom the defendant company had collected undue *account* of freight from, or charged, if it did so collect it.

And at his request the court notes an exception thereto May 15th, 1895.

JOS. BUFFINGTON, *D. J.* [L. S.]

Fourth. The defendant excepts, by his counsel, to the following portion of the charge of the court to the jury, viz:

"Conceding these men were differently situated, that Bruening had his beer delivered from his siding to his warehouse on the Panhandle road and that Wolf could not have such a delivery, and that Bruening was in a position, from these facts, that the Baltimore & Ohio railroad (defendant's road), if untrammeled by the interstate-commerce act, would naturally offer him a lower rate than it would Mr. Wolf in order to get his trade, yet we are constrained to say that this difference between the two shippers, when considered in relation to the Panhandle road, does not constitute such circumstances and conditions as are contemplated in this second section of this

act, and that the party in such circumstances, apart from all other considerations, warranted the charging of Wolf a larger rate for performing a like service than it did Bruening. These facts—
171 that is, the advantage of location, in connection with the Panhandle road—were matters that were personal to Wolf and Bruening, and as regards the defendant's proposition to carry their freight, it did not affect the goods to be transported or affect in any way the transportation service to be rendered, so far as this second section is concerned. The second section does not provide for a uniform charge for two different shippers whose business advantages, whose locations, and whose facilities are substantially similar, and who are in those regards under substantially similar circumstances, but what it does give is a uniform rate where the transportation itself is of a like kind of traffic and such transportation is furnished under substantially similar circumstances. Such class of transportation—that is, where it is of a like kind of traffic, and where the transportation itself is under substantially similar circumstances and conditions—forms a uniform class, upon which the railroad is entitled to put a certain rate of freight, and each and every shipper who asks for the transportation of that particular character—that is, of a like kind of traffic and under substantially similar circumstances and conditions—is entitled to receive such transportation at the uniform rate, no matter what his advantages or disadvantages in other respects may be. It is the freight itself—its quantity, its character, and such other factors—and the transportation of such freight which are the elements to be considered in determining the class to which it shall be assigned when the rate of tariff is to be collected, and if the traffic is of a like kind and character and the transportation is to be made under substantially similar circumstances and conditions, then the law says the rate shall be uniform with shippers of that class."

And at his request the court notes an exception thereto May 15th, 1895.

JOS. BUFFINGTON, *D. J.* [L. S.]

172 Fifth. The defendant excepts, by his counsel, to the following portion of the charge of the court to the jury, viz:

"Now, what are the facts in reference to the transportation of this beer? What rate—and that is a fact for you to determine—what rate, in fact and in substance, under the evidence in this case, was charged Mr. Bruening for the transportation of this beer from Cincinnati to the terminal station at Pittsburgh? Was it the same rate that was charged Mr. Wolf? If it was, then your verdict should be that of not guilty. Or, was Mr. Bruening charged a different rate for a like service, under substantially similar circumstances and conditions, than Mr. Wolf was? You will notice, gentlemen, from the facts that there — two questions for you to determine: First, was there a like service rendered these two men—a like — contemporaneous service rendered these two men—in the transportation of a like kind of traffic under similar circumstances and conditions? If there was a like service rendered, then was Mr. Wolf

charged for that service more than Mr. Bruening was? If you find both of these facts to be in the affirmative, then your verdict would be a verdict of guilty in manner and form as the defendant stand-indicted. If, on the other hand, you find, on the definitions of these terms and instructions as given you by the court, there was not a like service performed for these men, or, if there was a like service, that they were charged the same rates for that service, then your verdict would be that of not guilty."

And at his request the court notes an exception thereto May 15, 1895.

JOS. BUFFINGTON, *D. J.* [L. S.]

Sixth. The defendant excepts, by his counsel, to the following portion of the charge of the court to the jury, viz:

173 "He was charged 15 cents; but it is a matter for the jury to determine, under all the evidence, what service was performed for Mr. Wolf—where his beer was hauled from, where it was hauled to, what charges *was* made him for that service? Was there a like service of the same kind of traffic, under the same circumstances, performed for Mr. Bruening? If it was, how much was the charge for that service which was like, equivalent to, the service that was performed for Mr. Wolf? And in that connection we will read to you the remarks made in a court of the United States upon a trial of one of these cases of a similar character:

"It is said that — the contract of carriage of a railway, common carrier, is generally understood such transportation of the goods from the warehouse of the railway at the point of shipment to the railway-house at the point of destination. Generally, the cartage from the railway-house to the storehouse of the consignee is paid by him. If the railway company pays it, the expense of transporting the goods to the place where he can use them is lessened by the cost of cartage. This is generally equivalent to the railroad company reducing the freight by as much as the cartage would cost the consignee."

And at his request the court notes an exception thereto May 15th, 1895.

JOS. BUFFINGTON, *D. J.* [L. S.]

174 And forasmuch as the foregoing facts do not fully appear of record, the defendant prays that this his bill of exceptions may be signed and sealed and made part of the record, which is accordingly done.

JOS. BUFFINGTON, *D. J.* [L. S.]

175 Endorsement: No. 18. October term, 1894. Criminal docket. United States district court, west. dist. of Pa. United States *vs.* C. S. Wight. Defendant's bill of exceptions. Filed February 19, 1896.

176 *Order of Court Extending Time for Filing Transcript.*

And now, to wit, February 20, 1896, on motion of Johns McCleave, of counsel for the said defendant, and for good cause shown, the time for the filing of the transcript of the record surappeal in said case in the Supreme Court of the United States is enlarged and extended for thirty days from the date hereof.

BY THE COURT.

Filed February 20, 1896.

177 Endorsement: No. 18. October term, 1894. Criminal docket. United States district court, western district of Penna. United States *vs.* C. S. Wight. Order of court extending the time for filing transcript surappeal for 30 days. Filed Febr'y 20, 1896.

178 UNITED STATES *vs.* C. S. WIGHT. } No. 18. October Term, 1894. Criminal Docket.

And now, to wit, March 19th, 1896, on motion of Johns McCleave, of counsel for the said defendant, and for good cause shown, the time for the filing of the transcript of the record surappeal in said case in the Supreme Court of the United States is enlarged and extended for thirty days from the date hereof.

BY THE COURT.

179 Endorsement: No. 18. October term, 1894. Criminal docket. United States district court, western district of Penna. United States *vs.* C. S. Wight. Order of court extending the time for filing transcript surappeal for 30 days. Filed March 19, 1896.

180 In the District Court of the United States for the Western District of Pennsylvania.

UNITED STATES *vs.* C. S. WIGHT. } No. 18. October Term, 1894. (Criminal Docket.)

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

Seal of U. S. District Court, W. D. Pennsylvania.

I, William T. Lindsey, clerk of the district court of the United States for the said district, do hereby certify that the annexed and foregoing pages contain a true and correct copy of the record and proceedings in the above-entitled case, so full and entire as the same remains of record and on file in my office.

In testimony whereof I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, this 17th day of April, A. D. 1896.

WM. D. LINDSEY, *Clerk.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, Joseph Buffington, district judge of the United States for said district, do hereby certify that William T. Lindsey, above named, was at the time of making the above certificate and is now clerk of the said court, and that the said certificate made by him is in due form of law.

JOS. BUFFINGTON,
U. S. District Judge.

Pittsburgh, April 17th, 1896.

181 [Endorsed:] No. —. —— term, 187– (—— docket). District court of the United States, western district of Pennsylvania. Exemplification of the record.

182 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States district court for the western district of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, between The United States and C. S. Wight, impleaded with R. M. Fraser, a manifest error hath happened, to the great damage of the said C. S. Wight, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2nd Monday of October next, in the said Supreme Court, to be then and held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and custom of the United States should be done.

Seal of U. S. District Court, W. D. Pennsylvania.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 21st day of November, A. D. 1895.

WM. T. LINDSEY,
Clerk United States District Court,
Western District of Pennsylvania.

Allowed by—
JOS. BUFFINGTON,
U. S. Dist. Judge.

[Endorsed:] No. —. —— term, 18—. —— —— *vs.* —— ——. Writ of error.

183 UNITED STATES OF AMERICA, } *sct:*
Western District of Pennsylvania, }

To Hon. Harry Alvan Hall, attorney of the United States for the western district of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 2d Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States district court, wherein C. S. Wight — plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal of U. S. District Court, W. D. Pennsylvania.

Witness my hand this twenty-first day of November, A. D. 1895.

JOS. BUFFINGTON,
Judge of U. S. District Court.

Attest: WM. T. LINDSEY, *Clerk.*

[Endorsed:] No. —. —— term, 18—. —— —— *vs.* —— ——. Citation.

Endorsed on cover: Case No. 16,260. W. Pennsylvania D. C. U. S. Term No., 970. C. S. Wight, plaintiff in error, *vs.* The United States. Filed April 18, 1896.

167-512

Office Supreme Court U. S.
FILED.
APR 25 1896
JAMES H. McKENNEY,
CLERK.

167-512

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

C. S. WIGHT, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 970.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

C. S. WIGHT, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 970.

MOTION TO ADVANCE.

The plaintiff in error, the general freight agent of the Baltimore and Ohio Railroad at Pittsburg, Pa., was indicted in the district court of the United States for the western district of Pennsylvania at the October term, 1894, for unlawful discrimination in transporting freight, *i. e.*, beer in car-load lots, over the Baltimore and Ohio Southwestern and Baltimore and Ohio Railroads from Cincinnati, Ohio, to Pittsburg, Pa., at less than the legal rate as shown by a schedule filed by the companies with the Interstate Commerce Commission. He was tried before a jury, found guilty, and sentenced to pay a fine of $1,000 and costs and stand committed until the sentence

should be complied with. He has been admitted to bail in the sum of $1,000 pending the decision of this court on his writ of error.

The Solicitor-General respectfully moves the court to advance the case on the docket and set it down for hearing on such day during the next term as may be convenient to the court.

Notice of this motion has been served on opposing counsel and proof of service filed with the clerk.

HOLMES CONRAD,
Solicitor-General.

OCT 19 1896
JAMES H. MCKENNEY,
CLERK

IN THE

Supreme Court of the U. S.

OCTOBER TERM, 1896.

No. 494.

C. S. WIGHT, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

In Error to the District Court of the United States for the Western District of Pennsylvania.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN K. COWEN,
HUGH L. BOND, JR.,
of Counsel.

JOHN MURPHY & CO., PRINTERS AND PUBLISHERS, BALTIMORE.

IN THE

Supreme Court of the U. S.

October Term, 1896.

No. 494.

C. S. WIGHT, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

In Error to the District Court of the United States for the Western District of Pennsylvania.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The plaintiff in error, who was the General Freight Agent of the Baltimore and Ohio Railroad Company, was indicted October, 1894, under the Act to Regulate Commerce, for alleged unlawful discrimination, forbidden by the second section of that Act. The specific charge laid in the indictment was that the plaintiff in error

had, on July 27, 1892, charged one F. H. Bruening the sum of eleven and one-half cents per hundredweight for beer in car-load lots, transported from Cincinnati to Pittsburgh, "and which said sum of eleven and one-half cents per hundredweight, so charged, demanded, collected, and received for the transportation of said property as aforesaid from F. H. Bruening, as aforesaid, was then and there a less compensation for the service rendered to the said F. H. Bruening in the transportation of said property as aforesaid than was charged to, demanded, collected and received from Henry Wolf for doing for him a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." (Record, page 3.)

The defendant's Bill of Exceptions (pages 65 to 78) contains the substance of all the evidence offered by the parties, and is so certified. (Page 78.)

The undisputed facts proved in evidence, are as follows: F. H. Bruening was engaged, during the year 1892, in the business of a wholesale dealer in beer in the city of Pittsburgh; he purchased his beer in Cincinnati in car-load lots, from the Moerlein Brewing Company of that city; Bruening's place of business was situated on the track of the Pittsburgh, Cincinnati and St. Louis Railroad Company, known as the "Pan-handle," and had a siding connection with that road, so that Mr. Bruening could ship his beer from Cincinnati over the Pan-handle Railroad, and have it delivered and unloaded directly into his warehouse. The rate by the Pan-handle Railroad for this service from Cincinnati to the warehouse was fifteen cents per hundred pounds. The station of the Baltimore and Ohio Railroad Company in Pittsburgh was at some distance from Bruening's warehouse, and there was no track connection between the Baltimore and Ohio Railroad and the warehouse, so that if Bruening shipped his beer from Cincinnati by the Baltimore and Ohio route, it was necessary to haul it in wagons from

the Baltimore and Ohio station to the warehouse. The rate charged by the Baltimore and Ohio route betweeen Cincinnati and Pittsburgh, on beer in car-loads, was likewise fifteen cents per hundred pounds.

In the month of June, 1892, agents of the Baltimore and Ohio Railroad Company, subordinate to the plaintiff in error, made an arrangement with Mr. Bruening by which it was agreed that, if Bruening would ship his beer *via* the Baltimore and Ohio route from Cincinnati to Pittsburgh, the Railroad Company would make the same delivery at the door of his warehouse that was made by the Pan-handle Railroad; that is to say, the Railroad Company would haul the beer from its station to Bruening's warehouse without extra charge. When, afterward, it was found that the cost to the Railroad Company for this hauling would be three and one-half cents per hundred pounds, Bruening offered to do the hauling himself for that price, and his offer was accepted. This arrangement was reported to the plaintiff in error by his subordinates, approved by him, and continued in effect during the months of June, July, August and September, 1892. During these months Bruening made large shipments of beer in car-loads, *via* the Baltimore and Ohio route, paid the charge of fifteen cents per hundred pounds on delivery, hauled the beer from the station to his warehouse, and at the end of each month presented and collected a bill for three and one-half cents per hundred pounds for the hauling. At the trial there was no question made of the good faith of the arrangement with Bruening; it was not questioned that the three and one-half cents was the fair cost of the hauling; that the sole object of the arrangement was to make the same delivery which was made by the Pan-handle Railroad, and at the same charge of fifteen cents per hundred pounds.

During the continuance of this arrangement with Bruening, as shown in the evidence, the Kaufman Brewing Company, of Cin-

cinnati, made several shipments of beer in car-loads, by the Baltimore and Ohio route, on bills of lading in the form shown at pages 73, 74 and 75 of the Record. Each of these shipments was consigned to the "Kaufman Brewing Company, care of or notify Henry Wolf, Pittsburgh, Pa., to order of shipper," and was taken at the fifth class rate of fifteen cents per hundred pounds, as shown on the face of the bill. Henry Wolf was a wholesale dealer in beer in Pittsburgh, whose warehouse was near the station of the Baltimore and Ohio Railroad Company, but was not connected by track with any railroad. The bills of lading for the Kaufman Brewing Company's shipments were transmitted through bank with draft attached, and Mr. Wolf testified that, after he received notice from the Railroad Company of the arrival of each shipment, he went to the bank and paid the draft, received the bill of lading, and, on presenting it and paying fifteen cents per hundred pounds, received the beer, which he hauled to his warehouse at his own expense.

At the trial three grounds of defense were pressed on behalf of the plaintiff in error:

1. That under the facts proved as to the shipments by the Kaufman Brewing Company the transportation service was performed for that Company and not for Henry Wolf, and that therefore there was a fatal variance between the evidence and the charge laid in the indictment. This defense was raised by the defendant's third and fourth prayers. (Record, pp. 80 and 81.)

2. That if the arrangement made with Bruening for the delivery of his beer at his warehouse was made in good faith, and the payment of three and one-half cents per hundred pounds was made to him in pursuance of that agreement in consideration of his doing the hauling, then the facts proved could not support an indictment under the second section of the Act to Regulate Commerce, because such payment made in good faith did not constitute

any rebate, drawback or other device for charging a less rate; that if unlawful at all, it amounted only to an undue preference under the third section of the Act. This defense was raised by defendant's first prayer. (Record, pages 78 and 79.)

3. That the location of Bruening's warehouse and connection with the Pan-handle Railroad, and his ability to ship his beer from Cincinnati directly to the door of his warehouse for the charge of fifteen cents per hundred pounds, by the Pan-handle route, constituted circumstances or conditions affecting Bruening's traffic which did not affect the traffic of Henry Wolf, and that in meeting the competition of the Pan-handle road, for the traffic of Bruening, the defendant was guilty of no unjust discrimination against Wolf. This defense is raised by defendant's second prayer. (Record, pages 79 and 80.)

The Court refused all the prayers of the defendant (noting exceptions), and charged the jury at length. (Record, pages 81 to 87.) The defendant's exceptions to portions of the charge will be found on pages 87 to 90 of the Record.

There was a verdict of guilty as indicted, and motion for a new trial was overruled, the Court filing the opinion printed at page 15 of the Record. The sentence of the Court, entered November 5, 1895, was, that the plaintiff in error pay a fine of one thousand dollars and costs of prosecution, and stand committed until the sentence be complied with. From that sentence and judgment the present appeal was taken.

ASSIGNMENTS OF ERROR.

The assignments of error filed below, November 21, 1895, are found in the Record, pages 58 to 63. Of those assignments of error we shall rely, in this Court, on the second, fourth, fifth, sixth, seventh, and eighth, and shall discuss them under two heads, inasmuch as they show, as we think, two fundamental errors in the construction of the Act to Regulate Commerce.

I. Under the first head we shall include the answer of the Court to the defendant's first prayer, and those portions of the Court's charge relating to the defense raised by that prayer, to wit:

"(7.) The Court erred in its answer to first prayer for instructions presented on behalf of defendant; which prayer and answer are as follows, to wit:

"'If the jury believe from the evidence that the Baltimore and Ohio Railroad Company, of which Company the defendant is an agent, and the Baltimore and Ohio Southwestern Railway Company were at the time of the alleged offense jointly engaged in the operation of a through line of railroad between Cincinnati and Pittsburgh and in the transportation of freight over the said line were competing for business between said points with the Pittsburgh, Cincinnati and St. Louis Railway Company; also engaged in the operation of a line of railroad between the said points, and that at Pittsburg the warehouse of the Messrs. Bruening was situate in proximity to the tracks of the Pittsburgh, Cincinnati and St. Louis Railway and had a siding or spur track extending from the main line of the said Pittsburgh, Cincinnati and St. Louis Railway to their said warehouse, by means of which the said Pittsburgh, Cincinnati and St. Louis Railway Company delivered freight in car-load lots immediately to the warehouse of the said Bruening, and for which service the said Company made no par-

ticular or specific charge to the said Bruening and received no compensation therefor other than the tariff rate established for transportation between Cincinnati and Pittsburgh, and that the Baltimore and Ohio Railroad Company had no such siding connection with the said Bruening and were unable to deliver freight in carloads to the warehouse of the said Bruening by means of a railroad track and the use of locomotive power and were thereby unable to compete with the said Pittsburgh, Cincinnati and St. Louis Railway Company in the transportation of freight from Cincinnati consigned to the said Bruening, and that defendant, in good faith and for the purpose of equalizing the delivery to the said Bruening with the delivery made by the Pittsburgh, Cincinnati and St. Louis Railway Company, agreed with the said Bruening to haul by means of wagons and horses the said freight from the Baltimore and Ohio tracks to the warehouse of the said Bruening, or agreed to pay to the said Bruening the fair cost of such hauling in case they themselves did the hauling, and that the payments to said Bruening proved in evidence were made only in pursuance of such agreement, then the defendant is not guilty of the offense charged in the indictment, such payments, if made in good faith, not constituting any rebate, drawback, or other device for charging a less rate, but, if unlawful at all, amounting only to an undue preference under the third section of the Act to Regulate Commerce.'

"Answer. 'The defendant is charged in this indictment with receiving a less compensation from Bruening for the same service than he charged and received from Wolf. What the transaction was is a fact to be determined by the jury upon all the evidence. If they find under the instructions that Wolf was charged a higher rate than Bruening for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, their verdict should be guilty.'

"(2.) The Court erred in the portion of the charge to the jury set forth in the defendant's second Bill of Exceptions, as follows:

"'The purpose of the second section of the Interstate Commerce Law, gentlemen, was to afford to all shippers who applied for transportation of like character of freight by the railroad company, under similar circumstances and conditions, that they should all of that class receive a uniform rate, that there should be no discrimination between them. The franchises or powers of a railroad company as common carriers empower them to transfer this freight from their terminal station at Cincinnati to their terminal station at Pittsburgh. That was all they could legally be called upon to do. If a shipper in Cincinnati desired a railroad company to go to his place of business and put his freight in drays and carry it to a terminal station, that was a matter which the railroad company as a common carrier was not bound to do. It could do it if it saw fit, but it was a matter of grace and not of right on the part of the railroad; so when the freight was brought to the other terminal, the railroad company would have a right, if it saw fit, to deliver the freight in carts or wagons, but that was a matter which it was not called upon as a common carrier to do as a matter of right. For ordinary purposes, the terminals of these roads was the limit of their duty, so far as the transportation was concerned, of their duty as common carrier, unless they saw fit to accept a further duty in the way of delivering the goods off the line of their road—I mean, unless they saw fit to undertake the delivery of the goods by way of carts or wagons.'

"(5.) The Court erred in the portion of the charge to the jury set forth in the defendant's fifth Bill of Exceptions, as follows:

"'Now, what are the facts in reference to the transportation of this beer? What rate—and that is a fact for you to determine—what rate, in fact and in substance, under the evidence in this case, was charged Mr. Bruening for the transportation of this beer from

Cincinnati to the terminal station at Pittsburgh? Was it the same rate as was charged Mr. Wolf? If it was, then your verdict should be that of not guilty. Or was Mr. Bruening charged a different rate for a like service under substantially similar circumstances and conditions than Mr. Wolf was? You will notice, gentlemen, from the facts that there are two questions for you to determine: First, was there a like service rendered these two men—a like contemporaneous service rendered these two men—in the transportation of a like kind of traffic under similar circumstances and conditions? If there was a like service rendered, then was Mr. Wolf charged for that service more than Mr. Breuning was? If you find both of these facts to be in the affirmative, then your verdict would be a verdict of guilty in manner and form as the defendant stands indicted. If, on the other hand, you find, on the definitions of these terms and instructions as given you by the Court, there was not a like service performed for these men, or, if there was a like service, that they were charged the same rate for that service, then your verdict would be that of not guilty.'

"(6.) The Court erred in the portion of the charge to the jury set forth in the defendant's sixth Bill of Exceptions, as follows:

"'Mr. Wolf was charged 15 cents, but it is a matter for the jury to determine under all of the evidence what service was performed for Mr. Wolf; where his beer was hauled from; where was it hauled to; what charges were made him for that service; was there a like service of the same kind of traffic under the same circumstances performed for Mr. Bruening; if it was, how much was the charge for that service, which was like, equivalent to, the service that was performed for Mr. Wolf? And in that connection we will read to you the remarks made in a court of the United States upon a trial of one of these cases of a similar character:

"'It is said that—the contract of carriage of a railway—common carrier—is generally understood such transportation of the goods from the warehouse of the railway at the point of shipment to the railway house at the point of destination; generally the cartage from the railway-house to the storehouse of the consignee is paid by him. If the railway company pays it, the expense of transporting the goods to the place where he can use them is lessened by the cost of cartage. This is generally equivalent to the railroad company reducing the freight by as much as the cartage would cost the consignee.'"

II. Under the second head we shall include the Court's answer to the defendant's second prayer, and the portion of the Court's charge relating to the defence raised by that prayer, as follows.

(8). The Court erred in its answer to second prayer for instructions presented on behalf of the defendant, which prayer and answer are as follows, to wit:

"If the jury believe from the evidence that the Baltimore and Ohio Railroad Company, of which company the defendant is an agent, and the Baltimore and Ohio Southwestern Railway Company were at the time of the alleged offense jointly engaged in the operation of a through line of railroad between Cincinnati and Pittsburgh, and in the transportation of freight over the said line were competing for business between said points with the Pittsburgh, Cincinnati and St. Louis Railway Company, also in the operation of a line of railroad between the said points, and that at Pittsburgh the warehouse of the Messrs. Bruening was in proximity to the tracks of the Pittsburgh, Cincinnati and St. Louis Railway, and had a siding or spur track extending from the main line of the said Pittsburgh, Cincinnati and St. Louis Railway to their said warehouse, by means of which the said Pittsburgh, Cincinnati and St. Louis Railway Company delivered freight in car-load lots immediately to the warehouse of the said Bruenings, and for which service the

said company made no particular or specific charge to the said Bruenings, and received no compensation therefore other than the tariff rate established for transportation between Cincinnati and Pittsburgh, and that the Baltimore and Ohio Railroad Company had no such siding connection with the said Bruenings, and were unable to deliver freight in car-load to the warehouse of the said Bruenings by means of a railroad track and the use of locomotive power, and were thereby unable to compete with the said Pittsburgh, Cincinnati and St. Louis Railway Company in the transportation of freight from Cincinnati consigned to the said Bruenings, and that defendant, in good faith and for the purpose of equalizing the delivery to the said Bruenings with the delivery made by the Pittsburgh, Cincinnati and St. Louis Railway Company, agreed with the said Bruenings to haul by means of wagons and horses the said freight from the Baltimore and Ohio tracks to the warehouse of the said Bruenings, or agreed to pay the said Bruenings the fair cost of such hauling in case they themselves did the hauling, and that the payments to said Bruening proved in evidence were made only in pursuance of such agreement, then the defendant is not guilty of the offense charged in the indictment, although the jury find also from the evidence that the defendant did charge, demand, collect, and receive from Henry Wolf the full tariff rates on the freight received by him and did not pay or offer to pay for the hauling thereof; provided the jury further find that the said Wolf did not have such siding connection between his warehouse and the tracks of any railroad company engaged in the transportation of freight between Cincinnati, Ohio and Pittsburgh."

Answer. "Refused."

"(4.) The court erred in the portion of the charge to the jury set forth in the defendant's fourth bill of exceptions as follows:

"'Conceding these men were differently situated, that Bruening had his beer delivered direct from his siding to his warehouse on

the Panhandle road, and that Wolf could not have such a delivery, and that Bruening was in such a position from these facts that the Baltimore and Ohio Railroad (defendant's road), if untrammeled by the interstate commerce act, would naturally offer him a lower rate than it would Mr. Wolf in order to get his trade, yet we are constrained to say that this difference between the two shippers, when considered in relation to the Pan-handle road, does not constitute such circumstances and conditions as are contemplated in this second section of this act, and that they were not such circumstances and conditions as, apart from all other considerations, warranted the charging of Wolf a larger rate for performing a like service than it did Bruening. These facts—that is, the advantage of location in connection with the Pan-handle road—were matters that were personal to Wolf and Bruening, and as regards the defendant's proposition to carry their freight it did not affect the goods to be transported or affect in any way the transportation service to be rendered so far as this second section is concerned. The second section does not provide for a uniform charge for two different shippers whose business advantages, whose locations, and whose facilities are substantially similar, and who are in those regards under substantially similar circumstances, but what it does give is a uniform rate where the transportation itself is of a like kind of traffic and such transportation is furnished under substantially similar circumstances.

"'Such class of transportation—that is, where it is of a like kind of traffic and where the transportation itself is under substantially similar circumstances and conditions—forms a uniform class upon which the railroad is entitled to put a certain rate of freight, and each and every shipper who asks for the transportation of that particular character—that is, of a like kind of traffic and under substantially similar circumstances and conditions—is entitled to receive such transportation at the uniform rate, no matter

what his advantages or disadvantages in other respects may be. It is the freight itself, its quantity, its character, and such other factors, and the transportation of such freight which are the elements to be considered in determining the class to which it shall be assigned when the rate of tariff is to be collected, and if the traffic is of a like kind and character and the transportation is to be made under substantially similar circumstances and conditions, then the law says the rate shall be uniform with shippers of that class.'"

ARGUMENT.

1. Construction of the Second Section of the Act to Regulate Commerce as a Criminal Law.

The construction given by the court below, to the second section of the act to regulate commerce, extends the scope of that section to include every form of preference or advantage between shippers.

The court instructed the jury in terms, that if the Railroad Company performed for one man a transportation service at a certain charge, and performed for another man that service and a little more for the same charge, then under the second section of the act the jury could compare the services rendered, say how far they were like, and determine whether the doing of a little more for the second man made the carrier's charge less for that part of the service which was like.

The case supposed is precisely the case at bar. The defendant in error did agree to do for Mr. Bruening the same service that he did for Mr. Wolf, and a little more; the charge was the same to both. The court below held that the jury could find the money value of the additional service performed for Bruening in excess

of that performed for Wolf, and could then find that the compensation charged for the rest of the service performed for Bruening was reduced by the amount of such value.

This same process can be applied to any conceivable preference or advantage which may be given to one shipper over another. So that the second section instead of being confined, as heretofore supposed, to the particular instance of a preference in charges, becomes extended to include every species or preference whatsoever.

The supposition is that because the second section prohibits a greater or less charge for one service than for another which is similar in the specified particulars, therefore the section enacts the converse also, and that when the charges are the same the one service must equal the other. This supposition is fallacious.

The intent of Section 2 is not to prescribe a rule of equality, but to define "unjust discrimination" in charges (*Interstate Commerce Commission* vs. *Baltimore and Ohio Railroad Company*, 145 U. S. 263.). The matter of preferences in service or otherwise is dealt with by section 3. The construction adopted by the court below brings the second section into conflict with the third, by extending a supposed hard and fast rule of equality to matters in which the third section recognizes the existence of lawful inequalities. The distinction is probably unimportant except in criminal prosecutions under the act; but in criminal cases it is essential that the second section be confined to its true intent and scope.

In *Tozer* vs. *United States*, (52 Fed. Rep. 917, 919) Mr. Justice Brewer said: "But in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty."

The second section of the Act to Regulate Commerce does contain something like a definite and certain definition of "unjust discrimination," as therein prohibited and declared to be unlawful.

We submit, however, that all definiteness and certainty are gone when that section is interpreted and applied as by the Court below in the portion of the charge quoted in the sixth Assignment of Error:

"Mr. Wolf was charged 15 cents, but it is a matter for the jury to determine under all of the evidence what service was performed for Mr. Wolf; where his beer was hauled from; where was it hauled to; what charges were made him for that service; was there a like service of the same kind of traffic under the same circumstances performed for Mr. Bruening; if it was, how much was the charge for that service, *which was like, equivalent to, the service that was performed for Mr. Wolf?* And in that connection we will read to you the remarks made in a court of the United States upon a trial of one of these cases of a similar character: 'It is said that the contract of carriage of a railway—common carrier—is generally understood such transportation of the goods from the warehouse of the railway at the point of shipment to the railway house at the point of destination; generally the cartage from the railway house to the storehouse of the consignee is paid by him. If the railway company pays it, the expense of transporting the goods to the place where he can use them is lessened by the cost of cartage. This is generally equivalent to the railroad company reducing the freight by as much as the cartage would cost the consignee.'"

The remarks read to the jury by the court below were those of Taft, J. in *Interstate Commerce Commission* vs. *Detroit, G. H. and M. Ry. Co.* (57 Fed. Rep. 1005) now pending on appeal in this Court (October Term, 1896, No. 539). The case is a civil one growing out of an alleged undue preference of one town over another in the payment of cartage.

In discussing in a civil case a question of undue preference under the third section of the act, such reasoning is unobjectionable, but to permit a jury to adopt it in a criminal prosecution under

section 2, is to destroy the certainty necessary in a criminal statute. In the opinion filed on the motion for a new trial, the court below said: "It was contended, and the jury have evidently so considered it, that the service rendered was two-fold—the freightage and the cartage. The admittedly fair price of the latter was three and a half cents per hundred, and it followed that the company received for freightage over its line eleven and a half cents." (Record, page 16).

The same course of reasoning would convict the Pan-handle Railroad of unjust discrimination whenever Bruening and Wolf both ship over that road. The car containing Bruening's shipment and the car containing Wolf's shipment would both be taken to the Grant Street yard of the Pan-handle road, Wolf's car would remain on an unloading track in the yard, and he must haul his beer thence to his warehouse. A switching engine would take Bruening's car to his warehouse siding, and put it in position to unload into his warehouse. This switching service costs the railroad company something, and is admittedly worth three and a half cents per hundred pounds to Bruening. According to the reasoning of the court below, we have here a clear violation of the second section of the Act for which the officers of the Pan-handle road may be indicted. But it is common knowledge, and must have been known to Congress when the Act to Regulate Commerce was passed, that tens of thousands of such warehouse siding deliveries were and are made every day by the railroad carriers of this country under circumstances precisely similar to those supposed.

"In order to constitute an unjust discrimination under section 2, the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate or other device; but in either case it must be for a "like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions." (145 U. S. 281.)

As a criminal law the second section of the Act to Regulate Commerce cannot be extended by construction, implication or otherwise beyond its plain terms. The Court below did so extend it by construction in the case at bar. We submit that the Court erred in its answer to the defendant's first prayer and in the portions of the charge to the jury set out in the second, fifth and sixth assignments of error.

2. Competition as a circumstance or condition to be considered under sections two and three of the Act to Regulate Commerce.

In its answer to the defendant's second prayer, and in the portion of the charge quoted in the fourth assignment of error, the court below held that the only circumstances or conditions which could be considered under the second section of the act were those relating to the character of the freight itself, its quantity, and other such factors, and to the physical carriage of the freight on the railroad.

In the opinion filed on motion for a new trial the court bases its construction on the authority of *London and Northwestern Ry. Co.*, vs. *Evershed*, L. R. 3 App. Cas., 1029, and other earlier English cases cited. (Record, page 17.) Of these cases some stand on the uniform interpretation given by the English courts to section 90 of the Act of 1845, and those of them which do not rest on that act, have been overruled by the latter cases of *Denaby Main Collier Co.* vs. *Manchester, S. and L. Ry. Co.*, L. R. 11 App. Cas. 97, and *Phipps* vs. *London and Northwestern Ry. Co.*, L. R. 2 Q. B. 229.

The construction which the court below put upon the second section of the act to regulate commerce does in fact make it exactly equivalent to section 90 of the English Act of 1845, and if that construction were correct the English decisions, which the court

cites, would support the decision below. Of the English cases Evershed's case is in some of its facts closely analogous to the case at bar, and an examination of the decision in that case, as interpreted by the later English decisions, will furnish a direct application of the English authorities and the law to the present case at bar.

The facts in Evershed's case were these: There were three railway companies having stations in the town of Burton-upon-Trent, by any one of which goods could be sent from Burton to any part of the United Kingdom. Messrs. Truman and Messrs. Ind and Coope were brewers at Burton. The plaintiff, Evershed, was also a brewer there. Messrs. Truman and Messrs. Ind had connections by sidings between the Midland Railway and their own premises; Evershed had no such connection with any line of railway. By the use of these sidings the goods of the two firms could be transferred from their breweries to the railway directly. Evershed had to pay a cartage for bringing his goods from his premises to the line of railway. To Messrs. Truman and Messrs. Ind, the Midland Railway charged no cartage, and, besides, allowed a rebate of nine pence per ton from the carriage rate of the goods, or what was called the "station to station" rate. There was no direct communication by siding between the Northwestern Railway and the breweries of these two firms, but when their goods were sent to that railway, though the cartage was done for them, there was no charge made for cartage, and the same rebate in the "station to station" rate was made as when they were sent to the Midland Railway. To Mr. Evershed the ordinary charges for cartage were made by the Northwestern Railway, and no rebate was allowed him. Evershed brought suit against the Northwestern Railway for money had and received, to recover what he alleged were unlawful overcharges. Evershed recovered judgment. L. R. 2 Q. B. D. 254. Judgement was affirmed by the Court of Appeal, L. R. 3 Q. B. D. 134, and the judgment was finally affirmed by the House of Lords; L. R. 3 App. Cas. 1029.

In his concurring opinion in the House of Lords, Lord Blackburn said:

"The 90th section of the Railways Clauses Consolidation Act says, in what seem to me very clear terms, that 'all such tolls' shall 'be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers, and of all goods, or carriages of the same description, and conveyed or propelled by a like carriage or engine passing only over the same portion of the line of Railway under the same circumstances.' I can hardly conceive clearer words than those to express the intention of the Legislature that there should be equality of charge in respect of all goods carried upon the same railway under the same circumstances. It may very well be that peculiar circumstances, as in some of the cases which have been referred to, make some difference. There may be the difference between wholesale and retail; a large quantity of goods may be carried cheaper than a smaller quantity of goods; that would be a difference of circumstances. And many other cases may be pointed out in which the circumstances would not be the same.

"But the argument here has been almost entirely this, that because the two firms of brewers who have been mentioned happen to be so situated as to the Midland Railway that they can get cheap carriage by the Midland Railway Company, and consequently will not go to the Northwestern Railway Company if the Northwestern Company charges them the ordinary rate, therefore, because there is that difference in the persons, the Northwestern Railway Company may reduce the price to them in order to tempt them to bring their traffic to that Company. I quite agree that this is not done with any view of injuring, or intention to injure, Mr. Evershed. It is done with a view to coax some of the traffic which would otherwise go to the Midland Railway to come to the Northwestern Railway. It may be (but I do not give

any opinion as to that) that it would have been provident and proper on the part of the Legislature, in making the enactment, to say that there should be an exception in such cases, and that there might be a different rate given in order to coax and induce traffic to go by a different route from that by which it would otherwise have gone." . . . . "What the Legislature has clearly said is that the tolls must be charged equally to all persons under the same circumstances. I think that means under similar circumstances as to the goods, not as to the person. I do not think the person comes into the question at all."

All the opinions in the House of Lords base the decision on the same construction of section 90 of the Act of 1845, and make no reference whatever to the Act of 1854.

In *Phipps* vs. *The London and Northwestern Railway Company*, L. R. 2 Q. B. 229 (1892), the railway company was charged with an undue preference, under the second section of the Railway and Canal Traffic Act of 1854, which enacts precisely the same prohibition against undue or unreasonable preferences or advantages between persons and between particular descriptions of traffic as that contained in the third section of the Act to Regulate Commerce.

Phipps was the owner of the Duston furnaces, situated on the London and Northwestern Railway, and connected therewith by siding. He alleged that the railway company gave an undue and unreasonable preference or advantage to certain owners of iron furnaces at Butlins and Islip, in respect of charges for conveyance of pig iron to the South Staffordshire markets. The Butlins and Islip furnaces were likewise on the line of the Northwestern Railway, connected by sidings with that line, and at a greater distance from the South Staffordshire markets. The Butlins and Islip furnaces, however, had siding connections with the Midland Railway, and could reach the markets in question by that line, while the

Duston furnaces had no such connection. The Northwestern Railway met the rate of the Midland Railway at the Butlins and Islip furnaces, and charged a higher rate from the Duston furnaces.

The main question for the Court of Appeal was, whether the competition of the Midland Railway at the Butlins and Islip furnaces was in law a matter to be considered in determining the existence of the undue and unreasonable preference alleged by Phipps.

Lord Herschel in delivering the main opinion, in which the other Lords Justices concurred, said:

"But as regards the differences between Duston and Islip, which, although eleven miles further from the market, the point of destination, was charged the same as Butlins, the Court below proceeded upon another ground. They took into consideration the local position of the Islip and the Butlins furnaces in relation to their access to the Midland Railway Company, and the consequent competitition between the Midland and the London and Northwestern, and to the fact that the Midland made a particular charge both from Butlins and Islip, and that the London and Northwestern Railway Company could not expect to get the traffic from Butlins and Islip except by making the same charge, and that taking this into account, the London and Northwestern Railway Company might properly group Butlins and Islip for the purposes of traffic, and that their doing so was not, under the circumstances, grouping together two places which were unreasonably distant within the meaning of the 29th section of the Act of 1888, nor were the places grouped together so as to create an undue preference.

"Now there is no doubt that in coming to that determination the Court below did have regard to the competition between the Midland and the London and Northwestern, and the situation of these two furnaces which rendered such competition inevitable. If the appellants can make out that in point of law, that is a consideration which cannot be permitted to have any influence at all,

that those circumstances must be rigidly excluded from consideration, that they are not circumstances legitimately to be considered, no doubt they establish that the Court below has erred in point of law. But it is necessary for them to go as far as that in order to make any way with this appeal, because once admit that to any extent, for any purpose, the question of competition can be allowed to enter in, whether the Conrt has given too much weight to it or too little becomes a question of fact and not of law.

"The point is undoubtedly a very important one, and, I believe, comes now for the first time for decision before the Court of Appeal, though dicta are to be found upon the subject to which I will allude presently, and it has more than once been glanced at in cases which have come before the Courts. I propose to say what I have to say first upon the Act of Parliament itself, without regard to authority, considering afterwards whether the authorities point at all to a different conclusion. As I have already observed, the 2nd section of the Act of 1854 does not afford to the tribunal any kind of guide as to what is undue or unreasonable. It is left entirely to the judgment of the court on a review of the circumstances. Can we say that the local situation of one trader, as compared with another, which enables him by having two competing routes to enforce upon the carrier by either of those routes a certain amount of compliance with his demands, which would be impossible if he did not enjoy that advantage, is not among the circumstances which may be taken into consideration? I am looking at the question now as between trader and trader. It is said that it is unfair to the trader who is nearer the market that he should enjoy the full benefit of the advantage to be derived from his geographical situation at a point on the railway nearer the market than his fellow trader who trades at a point more distant; but I cannot see, looking at the matter as between the two traders, why the advantageous position of the one trader in having his works so

placed that he has two competing routes is not as much a circumstance to be taken into consideration as the geographical position of the other trader, who, though he has not the advantage of competition, is situated at a point on the line geographically nearer the market. Why the local situation in regard to its proximity to the market is to be the only consideration to be taken into account in dealing with the question as a matter of what is reasonable and right as between the two traders, I cannot understand. Of course, if you are to exclude this from consideration altogether, the result must inevitably be to deprive the trader who has the two competing routes of a certain amount of the advantage which he derives from that favorable position of his works. All that I have to say is that I cannot find anything in the Act which indicates that when you are left at large, for you are left at large, as to whether as between two traders the company is showing an undue and unreasonable preference to the one as compared with the other, you are to leave that circumstance out of consideration any more than any other circumstance which would affect men's minds. I should have said so, and I do say so, upon the Act of 1854, and I find nothing in the Act of 1888 to exclude any such consideration, if it is not excluded by the Act of 1854."

By coincidence the competition in the Phipps case was between the same railway companies as was the competition in Evershed's case, and the facts in reference to the competition were so closely analogous in the two cases that the decision in Evershed's case was urged as conclusive authority in the Phipps case.

Lord Herschell recognized that the facts of competition were the same in both cases, but he disposed of Evershed's case as an authority, as follows:

"The case of Evershed, which was supposed to be an authority, cannot now, in the light of the decision in the Denaby Main Colliery Co. (11 App. Cas. 97), be regarded as an authority on

that point. In Evershed's case (3 Q. B. D. 134) no doubt, in the argument of the Court of Appeal, both the equality section and the undue preference section were alluded to, as they were in a judgment to which I will call attention in a moment; but the equality section clearly applied in that case, because all the goods were carried only over the same piece of line; and, therefore, on that ground the House of Lords affirmed the judgment in Evershed's Case (3 App. Cas. 1029); but, in the view of the House of Lords, in the subsequent case of the Denaby Main Colliery Co., it was only on that ground that they affirmed it, and not with any reference to the 2nd section to the Act of 1854, inasmuch as in the subsequent case the House of Lords held that no such action as was brought in Evershed's Case would have lain in respect of any charge of undue preference under the Act of 1854. Therefore, Evershed's Case as an authority upon this point is gone.

"No doubt, when you are dealing with the Railways Clauses Consolidation Act, 1845, as Lord Blackburn points out in his judgment in Evershed's Case (3 App. Cas. 1037, 1038), the words of the equality clause have no elasticity at all; there are no outside circumstances to be taken into consideration, and it is not a question of regarding the position of the one trader as compared with the other, and then saying whether there is any undue preference. It is an absolute rigid equality which is demanded by the statute. Lord Blackburn said it might have been very reasonable even in that case to allow other considerations to weigh, but that the legislature had not done so. Then, in Evershed's Case, no doubt, Lord Bramwell in his judgment did say (3 Q. B. D. 142) that in his view it would be an undue preference within the Act of 1854, as well as a breach of the equality clause of 1845. I need hardly say that I always attach great weight to his opinion, and speak of it with the utmost respect; but at that time the contrast between the purpose, and the distinction between the scheme of the Act of

1845 and that of 1854, had not been as thoroughly considered as it was by the House of Lords in the subsequent case of the *Denaby Main Colliery Co.* vs. *Manchester, Sheffield and Lincolnshire Ry. Co.* It is quite clear that the second ground on which he gave judgment for the plaintiff in Evershed's Case, cannot possibly be supported after the case in the House of Lords; and I think that the learned judge had not thoroughly considered—indeed, in that case he was not called upon to consider—the distinction which there is between the two statutes, and how considerations wholly outside the scope of the one may legitimately enter into the determination of a case under the other."

In the recent case of the *Texas and Pacific Railway Company* vs. *Interstate Commerce Commission* (March 30, 1896), Mr. Justice Shiras, delivering the opinion of this Court, after reviewing the English decisions, and especially Lord Herschell's opinion in the Phipps Case, held that competition, even though it exists beyond the seaboard of the United States, is a circumstance or condition which may be legally considered in determining the existence of an unjust discrimination under section 2 of the Act to Regulate Commerce, or of an undue or unreasonable preference under section 3 of that Act.

In the prior case of the *Interstate Commerce Commission* vs. *The Baltimore and Ohio Railroad Company* (145 U. S. 263), this Court had already given a construction to the 2nd section which gave that section an elasticity which, as pointed out by Lord Justice Blackburn, is lacking in the English act of 1845, section 90. It was strenuously contended on the part of the Commission, in that case, that the 2nd section was intended to establish a positive, peremptory and inflexible rule of equality, and that, as held by the Court below in the suit at bar, the only circumstances which could be considered in the application of that rule of equality were circumstances directly affecting the freight or the physical

carriage. This Court however, held that the object of section 2 of the Act was to prohibit *unjust* discrimination, and that construing the 2nd section with the 3rd the Act evidently contemplated the existence of discriminations or inequalities and sought only to prohibit such as were unjust or unreasonable.

In that case as well as in the later case of Texas and Pacific Railway Company, this Court also adopted the view of Judge Jackson, that one essential characteristic of unjust discrimination is that it harm some assignable person or persons.

In the case of Texas and Pacific Railway Company, *supra*, the opinion of the Court summarizes the decision, as follows.

"The conclusions that we draw from the history and language of the Act, and from the decisions of our own and the English courts, are mainly these: That the purpose of the Act is to promote and facilitate commerce by the adoption of regulations to make charges for transportation just and reasonable, and to forbid undue and unreasonable preferences or discriminations. That, in passing upon questions arising under the Act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and in considering whether any particular locality is subjected to an undue preference or disadvantage, the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment. That among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates and charges made at a low rate to secure foreign freights which

would otherwise go by other competitive routes are or are not undue and unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered. That if the Commission, instead of confining its action to redressing, on complaint made by some particular person, firm, corporation or locality, some specific disregard by common carriers of provisions of the Act, proposes to promulgate general orders, which thereby become rules of action to the carrying companies, the spirit and letter of the Act require that such orders should have in view the purpose of promoting and facilitating commerce, and the welfare of all to be affected, as well the carriers as the traders and consumers of the country."

In applying to the case at bar the law as established by the decisions of this Court, it is necessary, first, to note that the question here on this appeal and in the Court below in this criminal case, is and was simply the naked question of law, to wit, was the competition of the Pan-handle Road for the traffic going to Bruening's warehouse, a circumstance or condition legally to be considered under the second section of the Act to Regulate Commerce? Any question of bad faith on the part of the plaintiff in error being eliminated, if the competition of the Pan-handle Road affecting the traffic to Bruening's warehouse, was a circumstance or condition legally to be considered under section 2, then the second prayer of the defendant should have been granted, and the Court below erred throughout in its instructions to the jury.

The reasonableness or unreasonableness in the degree of preference or discrimination cannot be made the subject of an indictment, because, as pointed out by Mr. Justice Brewer in the case of Tozer *supra*, the criminal law cannot leave it to the jury to define the crime.

Competition between carriers is in so many instances the controlling consideration in fixing rates, that even the Interstate

Commerce Commission has, from the time of its organization, felt compelled to recognize it as a circumstance to be considered in the enforcement of the provisions of the 3rd and 4th sections of the Act to Regulate Commerce. The attempt of the Commission to exclude competition from consideration under the second section of the Act, has been finally disapproved by this Court. While forced to recognize the controlling effect of competition between carriers, the Commission has sought to draw arbitrary lines of distinction between competitive conditions which can lawfully be considered, and competitive conditions which, as the Commission holds, cannot lawfully be considered. One of those arbitrary distinctions made by the general orders of the Commission relative to import traffic, was considered by this Court in the Texas and Pacific Railway Company's case *supra*. Another of the arbitrary distinctions made by the Commission is that between the competition of a rival carrier or rival carriers subject to the Act to Regulate Commerce, and the competition of a rival carrier or rival carriers not subject to the Act to Regulate Commerce, whether because the latter are carriers wholly by water, or because their rail lines lie outside the United States. *Railroad Commission* vs. *Clyde Steamship Co.*, 5 Int. St. C. C. R. 327; *Gerke Brewing Co.* vs. *L. & N. R. R. Co.*, 5 Int. St. C. C. R. 596.

Inasmuch as the Commission has no power to fix either maximum or minimum rates or to compel the rival carrier to adhere to the rate so fixed, the distinction which the Commission seeks to make is based on no practical business difference. The competition of rival railroad carriers, subject to the provisions of the Act to Regulate Commerce and to such control as is given the Commission thereby, is just as effective commercially as is the competition of a rival carrier by water, or of a Canadian railroad.

Another distinction which, so far as we are aware, has never been drawn by the Commission, but has been suggested *obiter* in

one or more opinions of the lower courts of the United States, is a distinction based on the volume of traffic affected by the competition; as, for instance, a distinction between the competition of a rival railroad affecting the traffic of a whole town or city, and the competition of the same railroad affecting only the traffic of one or more business establishments, be they breweries, furnaces, or what not. In particular this distinction has been suggested in distinguishing the decision in Evershed's case; the real ground for distinguishing that case, viz., that it was decided under section 90 of the English Act of 1845, being overlooked.

The difficulty in drawing any such line of distinction is at once apparent: it is based on no principle which can act as a guide. Many of the manufacturing establishments in this country constitute communities in themselves, and the traffic to and from one manufactory is often greater in volume than that moving to and from a large town or an agricultural community of many thousands of persons. The Court of Appeal suggested no such distinction in the case of *Phipps* vs. *Northwestern Railway Company, supra*, although in that case the traffic involved was really only the traffic of three furnaces.

Both of these distinctions which have been suggested, the one by the Commission, the other by the dicta of the courts, disregard the real principle, by virtue of which competition may lawfully be considered in deciding the question of unjust discrimination or undue preference. That principle is, that the discrimination must be harmful. A difference in rates or facilities which recognizes the actual commercial advantages which one trader has over another, or one community has over another, or one traffic has over another, by reason of the foresight in choice of location or in investment, or by reason of the better judgment of those interested, does not harm the trader, or the community, or the traffic, as to which those interested have failed to acquire the same commercial advantages. Con-

gress has not undertaken to pass a leveling act which will deprive any trader or community of the advantageous position which his thrift or better judgment may have given him, and compel him to forego that advantage in favor of his rival in trade. It is not necessary to discuss whether Congress could pass such a leveling act, for the Act to Regulate Commerce attempts no such thing. Certain it is, that any construction of the Act to Regulate Commerce which would give it this effect, would be open to the same criticism indulged by this Court in reference to the general orders of the Commission, viz., that the Court would exercise the law-making power, and instead of enforcing the express provisions of the Act, would be passing "laws of wide import, destroying some branches of commerce that have long existed, and undertaking to change the laws and customs of transportation, in the promotion of what is supposed to be public policy."

We submit that the Court erred in refusing the defendant's second prayer, and in the instruction to the jury contained in that portion of the charge quoted in the fourth assignment of error.

JOHN K. COWEN,
HUGH L. BOND, JR.,
of Counsel.

167-512

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167-512

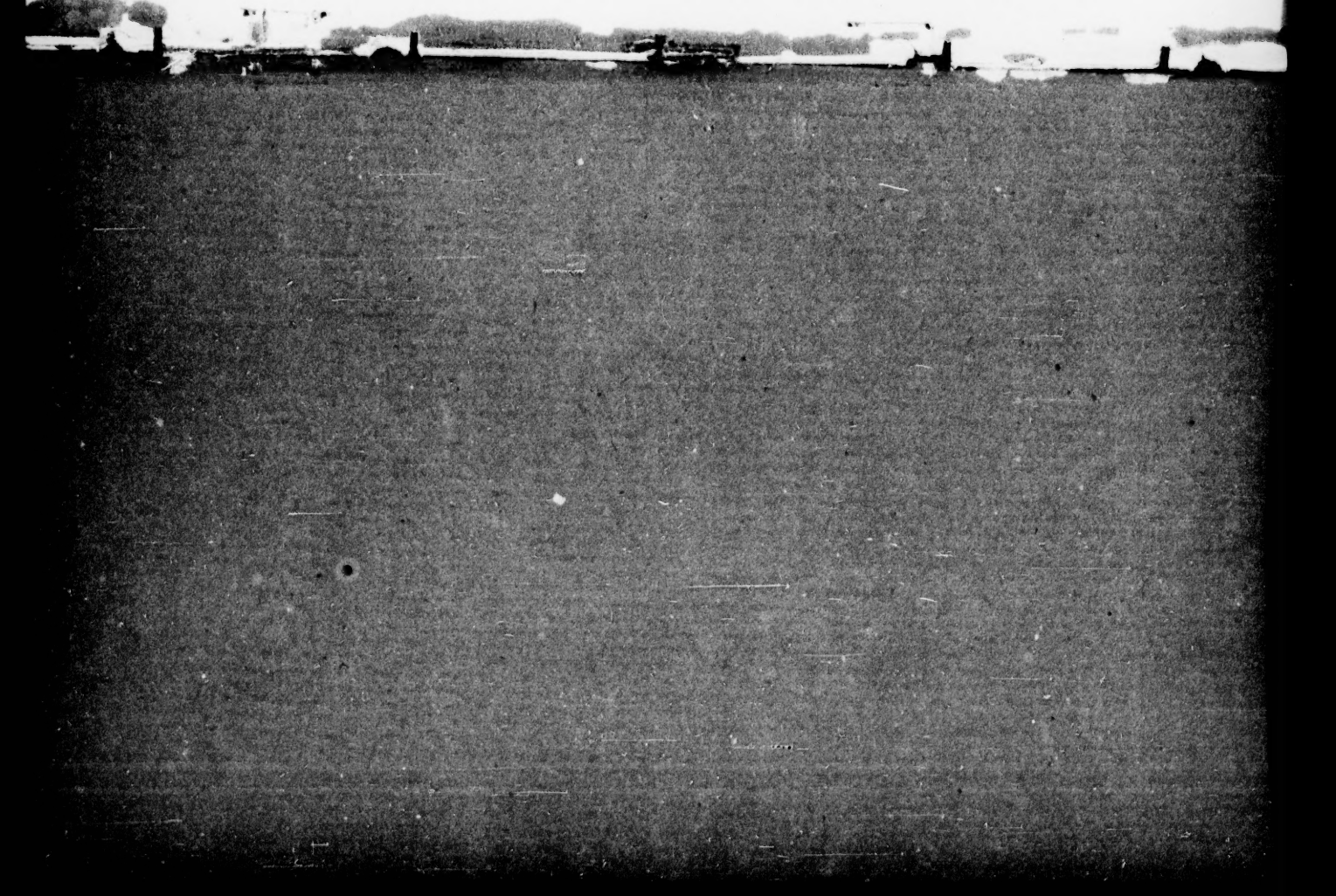
In the Supreme Court of the United States.

OCTOBER TERM, 1896.

C. S. WIGHT, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
} No. 494.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR DEFENDANT IN ERROR.



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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR DEFENDANT IN ERROR.

This case involves the question whether, since the Interstate Commerce Act, a railroad company can charge higher rates to one shipper than to another for the same service.

C. S. Wight, the plaintiff in error, was indicted (together with one R. M. Fraser, who was not tried) for unlawful discrimination in railroad charges on July 27, 1892. He was tried May 15, 1895, before Judge Buffington and a jury, and convicted. A motion for a new trial was made and received careful consideration. It was denied October 7, 1895, an opinion being filed, which is to be found at pp. 15–17 of the record.

The sentence imposed was only a fine. Imprisonment in the penitentiary could have been added, however. Hence the crime is infamous, and the writ of error properly taken to this court.

INDICTMENT.

The indictment, which is under § 2 of the Interstate Commerce Act of February 4, 1887, ch. 104, is in substance as follows: That on July 27, 1892, the Baltimore & Ohio Southwestern Railroad Co. and the Baltimore & Ohio Railroad Co., common carriers, etc., were under a common arrangement for continuous carriage of property from Cincinnati, Ohio, to Pittsburgh, Pennsylvania; had established joint tariff rates, including among others a rate of 15 cents per cwt. for beer in carload lots; had "filed a copy thereof as a schedule of rates and charges with the Interstate Commerce Commission;" and that this was the only lawful rate which the said corporations "or any person employed by or acting for them or any of them could lawfully charge," etc.

The indictment further charges that C. S. Wight and R. M. Fraser were then agents of said corporations and, well knowing, etc., did then and there, unlawfully, etc., by special rate, rebate, drawback and other device, charge, demand, etc., and did then and there, unlawfully, etc., cause to be charged, demanded etc., from F. H. Bruening a less compensation than said sum of 15 cents per cwt. in carload lots, "to wit, by then and there charging the said F. H. Bruening the sum of 11½ cents per cwt. for beer in carload lots" from Cincinnati to Pittsburgh;

this sum being "then and there a less compensation for the service rendered to the said F. H. Bruening in the transportation of said property as aforesaid than was charged to, demanded, collected and received from Henry Wolf for doing for him a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions."

THE RECORD.

The record contains the testimony at the trial *in extenso*, and not certified; and also a bill of exceptions giving an abbreviation of the material parts of the testimony. The former paper, to be found at pp. 17–57 inclusive, is no proper part of the record, and should be disregarded. (*United States* v. *Matthews*, 161 U. S., 500; *Pomeroy* v. *Bank of Indiana*, 1 Wall., 592; *Suydam* v. *Williamson*, 20 How., 427; *Redfield* v. *Ystalyfera Iron Co.*, 110 U. S., 174.) Defendant's requests to charge, and the charge of the court, are also unnecessarily duplicated.

The bill of exceptions will be found at pp. 65–90 inclusive. Some exceptions were taken upon questions of evidence, but have been abandoned by the assignments of error (pp. 58–63).

STATEMENT OF FACTS.

The Baltimore & Ohio Southwestern and the Baltimore & Ohio companies carry freight by joint arrangement over a continuous route from Cincinnati, Ohio, to Pittsburgh, Pa., by way of Midland City. It is called

the Midland route (p. 71). Their principal competitor is the so-called Pan Handle Railroad.

Both Bruening and Wolf were wholesale beer dealers in Pittsburgh, purchasing their beer in Cincinnati. When they brought their beer by way of the Midland route, they hauled it from the railroad terminus to their warehouses over the same way. The distance to Wolf's place of business was only 140 yards, while to Bruening's place of business it was 172 yards (p. 70).

Bruening's warehouse, however, was situated within 10 feet of the tracks of the Pan Handle road. "He was connected with their main tracks by a siding about 300 feet long, which connected with the main tracks about 30 or 40 feet from his warehouse." Shipments consigned to him over the Pan Handle road were first "taken to the Grant Street yard of the said company" and then shifted to "the siding in front of his warehouse door, so that he could unload from his car directly into his warehouse;" and "for such service in shipping the cars from the yard to the siding and placing them in position for unloading, the said railway company charged him nothing in addition to the tariff rate established between Cincinnati and Pittsburgh" (pp. 66–7). Wolf had no siding of his own, although he had sometimes obtained goods over another man's private siding, paying him therefor some agreed rate per carload (pp. 70, 78).

The rate for beer in carload lots from Cincinnati to Pittsburg was the same by both railroads; namely, 15 cents per cwt. (p. 77). Bruening, therefore, had been getting his beer over the Pan Handle road, as, by his

special privileges from that road, he saved the entire cost of cartage (p. 68). Mr. C. A. Chambers, the contracting freight agent of the railroads composing the Midland route, and Mr. F. D. Buskirk, the travelling freight agent of one of these roads, called upon him to ascertain whether they could not get his business, and were told that they could do so, if they could put his beer into his warehouse at a price not exceeding 15 cents per cwt., at which rate the Pan Handle road delivered it at his siding. Mr. Chambers then called upon the Pittsburgh Transfer Company, which gave him a figure of 3½ cents per cwt. for hauling the beer from the Baltimore & Ohio tracks to Mr. Bruening's warehouse. This was reported to Bruening, who then said "that he would like to do it at the same figure himself," "and asked that they let him haul it and pay the 3½ cents per cwt. to him." This was accordingly agreed upon (pp. 67, 70, 77–8). Mr. Wight, the defendant, as General Freight Agent of the Baltimore & Ohio road, authorized the arrangement (pp. 76–7). His object in doing so was "to equalize the rate with the Pan Handle, because the Pan Handle had a siding at his warehouse, and made the rate there of 15 cents per cwt.," and if the arrangement was not made, Bruening would continue to ship by the Pan Handle (p. 77).

Mr. Bruening, on cross-examination, made it pretty clear why it paid him to abandon his convenient arrangements with the Pan Handle road and have his beer carted across the city from the rival line. He says that he—

> Asked that they let him haul it and pay the 3½ cents per cwt. to him, as he already had the wagons

> and teams, by the use of which he could haul it at any time he saw fit;

and that this "was a fair price for hauling" (p. 67). On re-direct examination, he repeated the same explanation (p. 68):

> That notwithstanding the fact that the Pan Handle had a siding right at his warehouse, and that the Baltimore & Ohio was half a mile away, the fact that they paid 3½ cents for cartage made it more advantageous for him to ship over the Baltimore & Ohio.

On re-cross-examination he assigned a different reason; but his first statement seems likely.

In other words, Bruening was given a chance to make a profit on the cartage. The rate of 3½ cents offered by the Pittsburgh Traction Company, which is conceded to be a fair price, included not only a remuneration for the actual expenses of carting, but also would pay that company a share of its general expenses on account of plant, etc., and a business profit beside. Mr. Bruening had no new investment to make, having the wagons and teams already. The profit in carting would be greater to him than to the traction company.

Thereafter, in accordance with this arrangement, Bruening shipped over the Midland Route, paid his full freight of 15 cents per cwt., and at the end of each month rendered an account for cartage at 3½ cents per cwt., which was paid him (pp. 66, 67).

These rebates to Bruening and the shipments to Wolf at the full 15 cent rate continued during the months of June, July, August and September of 1892. The former amounted in these months to $2,374.68 (pp. 68–9).

Whether special rebates to individuals were illegal by the common law of common carriers was a disputed point. The weight of authority was to the affirmative (*Scofield* v. *Railway Co.*, 43 Oh. St., 571, and cas. cit.; *State* v. *C., N. O. & T. P. Ry. Co.*, 47 Oh. St., 130; *Messenger* v. *Pa. R. R. Co.*, 36 N. J. Law, 407; S. C. 37 N. J. Law, 531; *Atwater* v. *D., L. & W. R. R. Co.*, 48 N. J. Law, 55; *Sandford* v. *R. R. Co.*, 24 Pa. St., 378, 381; *Shipper* v. *Pennsylvania R. R. Co.*, 47 Pa. St., 338, 341; *Cumberland Valley R. R. Co.'s Appeal*, 62 Pa. St., 218, 230; *Audenried* v. *Phila. & Reading R. R. Co.*, 68 Pa. St., 370, 380; *McDuffee* v. *Portland & Rochester R. R. Co.*, 52 N. H., 430, 451–6; *N. E. Express Co.* v. *Maine Central R. R. Co.*, 57 Me., 188, 196; *L. E. & St. L. Cons. R. R. Co.* v. *Wilson*, 132 Ind., 517, 524; *Chicago & Alton R. R. Co.* v. *People ex rel. Koerner*, 67 Ill., 11, 17; *Cook* v. *C., R. I. & P. Ry. Co.*, 81 Iowa, 551; *Southern Wire Co.* v. *St. L. B. & T. Ry. Co.*, 38 Mo. App., 191, 200), although there is some authority to the negative (*Fitchburg R. R. Co.* v. *Gage*, 12 Gray, 393, 399; *Ex parte Benson & Co.*, 18 S. C., 38; *Johnson* v. *Pensacola & Perdido R. R. Co.*, 16 Fla., 623; *Houston & Texas Central Ry. Co.* v. *Rust*, 58 Tex., 98; *Bayles* v. *Kansas Pacific R. R. Co.*, 13 Colo., 181, 186; *Cowden* v. *Pacific Coast S. S. Co.*, 94 Cal., 470; and see *Root* v. *Long Island R. R. Co.*, 114 N. Y., 300; *Lough* v. *Outerbridge*, 143 N. Y., 271) based on *dicta* in English cases (*Baxendale* v. *Eastern Counties Ry. Co.*, 4 C. B. N. S. 63, 78; *Branley* v. *South Eastern Ry. Co.*, 12 C. B. N. S.,

63, 75; *Great Western Ry. Co.* v. *Sutton*, L. R. 4 H. L. 226, 237).

This court seems to have taken the affirmative view, saying that it is supported by "the weight of authority in this country" (*Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.*, 145 U. S., 263, 276) and citing the Scofield, Sandford, Messenger and McDuffee cases to the point that a common carrier should "put all its patrons upon an absolute equality" (*Union Pacific Ry.* v. *Goodridge*, 149 U. S., 680, 690–1; see also *Atchison, Topeka & Santa Fé R. R. Co.* v. *Denver & New Orleans R. R. Co.*, 110 U. S., 667, 674; *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S., 197, 211). The inferior Federal courts have taken the affirmative view very strongly. (*Hays* v. *Pennsylvania Co.*, 12 Fed. Rep., 309, 314; *McCoy* v. *Railroad Co.*, 13 Fed. Rep., 3; *Samuels* v. *Louisville & Nashville R. R. Co.*, 31 Fed. Rep., 57; *Burlington, C. R. & N. R. R. Co.* v. *Northwestern Fuel Co.*, 31 Fed. Rep., 652; *Heady* v. *Cleveland & Marietta R. R. Co.*, 31 Fed. Rep., 689, 692; *Kinsley* v. *Buffalo, N. Y. & P. R. R. Co.*, 37 Fed. Rep., 181; *Dinsmore* v. *Railroad Co.*, 2 Fed. Rep., 465, 476; *Southern Express Co.* v. *St. Louis, I. M. & S. Ry. Co.*, 10 Fed. Rep., 210, 214; *Union Trust Co.* v. *Atchison, Topeka & Santa Fé R. R. Co.*, 64 Fed. Rep., 992, 993; see *De Menacho* v. *Ward*, 23 Blatchf., 502.)

If this view be, as the undersigned believes, the correct one, then the Interstate Commerce Act is to a great extent declaratory. It provides, however, additional remedies for enforcing the legal duties of certain carriers; and

among them is the remedy which has been applied in the case at bar.

The best known precedents for the Interstate Commerce Act are found in the British statute book; and British cases, construing these precedents, are the authorities which are most commonly cited.

Passing by Lord Shaftesbury's Clauses and other special legislation, the first general provision is the famous Equality Clause of the Railway Clauses Consolidation Act of 1845 (8 & 9 Vic., c. 20, § 90):

> And whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favoring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties: It shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special act contained, from time to time to alter or vary the tolls by the special act authorized to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit; provided that all such tolls be at all times charged *equally to all persons*, and after the same rate, whether per ton per mile or otherwise, *in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances*; and no reduction or advance in any such tolls shall be made either directly or indirectly in favor of or

against any particular company or person travelling upon or using the railway.

This provision is a substantial repetition of § 50 of the act of 1844 (7 & 8 Vic. c. 3) which used the phrase "like circumstances" (*Crouch* v. *Great Northern Ry. Co.*, 9 Exch., 556, 561); and of the earlier special act of 3 Vic. c. 49, § 26 (Id. referring to *Pickford* v. *Grand Junction Ry. Co.*, 10 M. & W., 399, 416).

If special rates are given in violation of this clause, the other shippers can recover the difference in an action of money had and received. (*Great Western Ry. Co.* v. *Sutton*, L. R. 4 H. L. 226; *Manchester, Sheffield & Lincolnshire Ry. Co.* v. *Denaby Main Colliery Co.*, 13 Q. B. D., 674; S. C. 14 Q. B. D., 209; 11 App. Cas., 97.)

The other clause commonly referred to is the Undue Preference Clause of the Railway, Canal & Traffic Act of 1854 (17 & 18 Vic., c. 31, § 2):

> Every railway company, canal company, and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles; and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and every railway company and canal company and railway and canal company having or

working railways or canals which form part of a continuous line of railway or canal or railway and canal communication, or which have the terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any unreasonable delay, and without any such preference or advantage or prejudice or disadvantage as aforesaid, and so that no obstruction may be afforded to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf.

THE INTERSTATE COMMERCE ACT.

The Interstate Commerce Act of February 4, 1887, c. 104, in its restrictions upon railroad rates, covers all of the common law in its widest interpretation upon these points, and goes beyond it.

C. S. Wight, the plaintiff in error, was indicted under § 10 of the act, as amended by the act of March 2, 1889, c. 382, as follows:

> That any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person, acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein * * *

> shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges, for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

The "act, matter, or thing in this act prohibited or declared to be unlawful," for which Wight is held responsible, is an indirect discrimination, by means of a special rebate or similar device in freight charges, in defiance of § 2 of the act, which is as follows:

> That if any common carrier subject to the provisions of this act shall, *directly or indirectly, by any special rate, rebate, drawback, or other device*, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them *a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions*, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

§ 6 of the act, as amended in 1889, throws much light on the intent of the provision just quoted, providing as follows:

> That every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route. The schedules printed as aforesaid by any such common carrier shall plainly state *the places upon its railroad between which property and passengers will be carried*, and shall contain the classification of freight in force, and shall also state separately *the terminal charges* and *any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges*.

Rates thus scheduled can be advanced only upon ten days' notice, and reduced only under three days' notice, the notice to be public in each case. Copies of the schedules must also be filed with the Interstate Commerce Commission; and the company, by a further provision of the same section, is held rigidly to its engagement with the public:

> And when any such common carrier shall have established and published its rates, fares and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such

published schedules of rates, fares and charges as may at the time be in force.

§ 4, the "long and short haul clause," is of interest only because it repeats the phrase "substantially similar circumstances and conditions." It is as follows:

> That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however*, That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.

§ 2, above quoted, was modelled upon the British Equality Clause above quoted (*Texas & Pacific Ry.* v. *Interstate Commerce Commission*, 162 U. S., 197, 222); being, however, broader in its scope. The provision corresponding to the British Undue Preference Clause is the first paragraph of § 3, as follows:

> That it shall be unlawful for any common carrier subject to the provisions of this act to make or give

> any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

ARGUMENT.

It is respectfully submitted that this act, which is remedial and of vast public importance, should be construed according to its plain intent, and not upon any technical or narrow lines. (*United States* v. *Lacher*, 134 U. S., 624, 628; *Wiborg* v. *United States*, 163 U. S., 632, 647.)

I.

If the railroad company's action violated § 2 of the Interstate Commerce Act, plaintiff in error is criminally responsible therefor.

He is the head of the department. He was consulted beforehand, considered the question deliberately, and decided the question on behalf of the company (pp. 76–7).

II.

Assuming that the shipments to Bruening and Wolf were under substantially similar circumstances and conditions, the railroad company's action violated § 2.

(1) The services performed by the company were like and contemporaneous, and in the same kind of traffic—namely, transportation of beer in carload lots.

This needs no argument.

(2) Indirectly, by a special device, it charged less to Bruening than to Wolf.

Defendant's counsel are entirely in error in saying that he "did agree to do for Mr. Bruening the same service that he did for Mr. Wolf, and a little more."

The company delivered the beer to Bruening and to Wolf at the same point. Each carted away his own share. There was only one difference made between the two in the whole transaction—namely, that Bruening paid 15 cents and got 3½ cents back, while Wolf paid 15 cents and got nothing back. In other words, Bruening was charged 11½ cents, and Wolf was charged 15 cents. The special device was the use of the term "cartage;" but it might equally well have been called commissions, or drawback, or rebate.

The company was in no sense engaged in the transportation of goods from Cincinnati to Bruening's warehouse. In carting his beer, Bruening did not act, or purport to act, as its agent. Its scheduled rates were "from Cincinnati, Ohio, to Pittsburgh, Pennsylvania" (p. 65); and this, nothing appearing to the contrary, plainly means from the general freight terminus in Cincinnati to that in Pittsburgh. If the company had any branch termini or siding in either city, as to which there is no evidence, the rates from or to one of them would be the same as from or to the main terminus; for, (while plaintiff in error has failed to set forth the schedules at length in the bill of exceptions,) it sufficiently appears, from unchallenged statements of the trial judge, that the railroad's schedules contained but a single rate for beer in carload lots from one of these cities to the other (p. 82).

If the company were engaged in carting for Pittsburgh consignees, that portion of the total freight rate which represented the cartage should be separately stated; for the schedules must separate the terminal charges from the transportation charges proper (§ 6, *supra*). It is not claimed that the 15 cents includes any terminal services beyond such as are universally customary among American railways.

Since the company did not, as originally proposed, furnish cartage for Bruening free of charge, but simply gave him a *bonus*, which it did not give Wolf, for doing just what Wolf was doing also, the case comes clearly under § 2.

It is unnecessary to decide here whether, had it given free cartage to Bruening, charging him the same 15 cents which it charged Wolf, the case would have had a different aspect. Defendant's counsel, misapprehending the facts, insist that it would have been nothing more than an undue preference under § 3. It would doubtless have been an undue preference; but many cases are within both sections, as the English courts have frequently held. It is the belief of the undersigned that this case would be one of that class, and for the reasons given by Judge Taft, as quoted by defendant's counsel; but Judge Taft's opinion will itself come before this court for review. It makes no difference how much would be the value of the cartage. It must be a matter of some value, and some part of the freight money must be paid in consideration thereof. Hence, if the man who does not get so-called free cartage, and the man who does get it, pay equal amounts, the latter gets the benefit of a special device

whereby he pays less for the same service—that is, for the station to station transportation service, which is rendered to both.

The learned trial judge, however, went beyond the demands of necessity in commenting upon this question, and in quoting from Judge Taft; but the jury were in no way misled, and the defendant was in no way prejudiced.

(3) Assuming the circumstances and conditions to be similar, and the above argument to be sound, the jury are not to consider whether or not they regard the discrimination as "unjust." It is true that the question whether preferences under the third section of the act are "undue" or "unreasonable" is one of fact. But in the second section the act, while prohibiting "unjust" discriminations, carefully defines what the word "unjust" means. The phrase "unjust discrimination" is used for the purpose of giving a convenient name to the wrong thus defined.

III.

The shipments to Bruening and Wolf were under substantially similar conditions and circumstances, within the meaning of the law.

No difference in condition or circumstance is claimed to exist except this,—that Bruening had a siding on the Pan Handle road, and Wolf had not.

That Bruening was 32 yards further off from the Baltimore & Ohio line constitutes no material difference. If railroads are to be suffered to base discriminations between their customers on such differences in condition as between 140 and 172 yards in distance from the tracks, the law is a dead letter.

What privileges, not enjoyed by the general public, legally belong to the man whose real property is immediately adjacent to a railroad?

He often does have, and perhaps he always legally may have, great privileges from that particular railroad. Bruening thus saves $7,000 a year on his cartage. If his siding, and his privilege of free delivery at the siding, are a favor from the railroad which the railroad may withdraw at any time, he enjoys a preference very lucrative to himself, and the mere possibility of whose continuance gives an increment of value to the land upon which his warehouse stands. If the siding, and the privilege of free delivery, are accommodations which he has the right to demand of the railroad, then the land has an enormously increased value for warehouse purposes, due to its mere adjacency to the tracks. If he is but a tenant, the owner may safely raise the rent by thousands of dollars, and estimate his property's increase in selling value by tens of thousands.

Whether Bruening's private siding on the Pan Handle road is a matter of right or not, is not involved in this case, and we shall not discuss it. (See *Vincent* v. *Chicago & Alton R. R. Co.*, 49 Ill., 33; *Butchers' &c., Co.* v. *Louisville & Nashville R. R. Co.*, 31 U. S. App., 252, 266, per Taft, J.) The third section of the statute prohibits all undue or unreasonable preferences or advantages to individuals. The sixth section requires uniformity in terminal charges. The railroad may refuse private sidings in Pittsburgh altogether,—that is, unless such refusal gives an undue advantage to some rival city where private sidings are allowed. But if it allows a private siding to anybody,

is it not required to allow one to every adjoining owner who applies? If it contributes toward the construction of anybody's siding, is it not required to contribute equally to everybody else's? If it allows free delivery at any private siding, is it not bound to do so at all? In fine, is it not bound to give all abutting owners the full advantage of their situation? Or is it free to build up a monopoly in the control of one favored warehouseman, and enable him to absorb all the business of the city to the ruin of his competitors? These questions, just now, have but a speculative interest; and we allude to their discussion by defendants' counsel only in order to caution against possible misunderstandings from their remark that the "switching service costs the railroad company something." It does not appear whether Bruening or the Pan Handle company paid for his private siding. The siding once built, it is cheaper for the company to deliver to him there than at its public terminals, as there is a net saving in labor and station accommodation, notwithstanding the expense of the switching engine.

Land adjoining the Pan Handle line gets an advantage at the cost of other land in Pittsburgh, suitable for the same purposes, simply because of its adjacency. Has the Baltimore & Ohio road the right to give it still further advantage, at the cost of land which, to that road, is even more favorably situated? Wolf's beer, over either line, costs him, say, 17½ cents for transportation to his warehouse from Cincinnati. Bruening, over the Pan Handle, has been getting his for 15 cents. The Baltimore & Ohio road, by this so-called cartage allowance, now enables him to get it for, say, 14 cents net cost.

Does his advantage of situation give him the right to save this extra cent also? Or even to get the benefit of the 15 cent net rate from a second railroad?

The rebate, or so-called cartage allowance, to Bruening, was one incident in a plan of the Baltimore & Ohio management to get the business of the large brewers and beer dealers of Pittsburgh, by giving them special rebates to the disadvantage of their smaller competitors. (p. 76) These concerns had gained their advantage, and helped to build up their great establishments, by their private sidings on the Pan Handle. The new road could not get their business without underbidding the old. It could do this lawfully by reducing its rate all over Pittsburgh; but this would be publicly known, and would lead to a rate war. Hence it was necessary to underbid for the business of these fortunate concerns alone, and to offer them advantages over their competitors even greater than those which they already enjoyed. Certain favored individuals were thus enabled to make a little greater margin of profit. The distance between the small beer dealers and the big ones became a little greater. Certain freight moneys were transferred from the coffers of one railroad to those of another. Was it legitimate?

In this discussion it is to be borne in mind that the provisions relating to *discriminations between different localities* are not under consideration. These provisions are contained in the third and fourth sections, not the second. The second section contains no exception allowing discriminations when due and reasonable; nor does it give any dispensing power to the Interstate Commerce

Commission; nor does it, by a simple general prohibition of unjust discrimination, leave the definition of injustice to commission or court. Decisions upon locality rivalries are not here in point; nor can the decision which will in this case be given be controlling upon them.

The discrimination between the two wholesalers is not legitimate, because the service performed by the railroad for Bruening is under the same circumstances as that for Wolf. The services are cotemporaneous. The distance is the same. The direction is the same. The load is the same. The place and method of delivery are the same. The route is not part of a through route, commencing back of Cincinnati or to end beyond Pittsburgh.

The difference between the two men in power of getting cheap transportation over a rival line is immaterial. It is immaterial for this reason: that the phrase "substantially similar circumstances and conditions" refers to *similarity in the services performed*, and not similarity in the individualities which profit by their performance. This is shown in three ways: first, by the language of the act; second, by the judicial interpretation of its prototype; third, by its evident intent.

(1) The language of the act shows that the words "substantially similar circumstances and conditions" relate to the service performed by the company and not to the person for whom the service was performed. It prohibits special rebates to "*any* person or persons * * * for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances," etc.

The sixth section, repeating the same requirement in other language, provides for schedules and rates, and makes it unlawful "to charge, demand, collect, or receive from *any* person or persons a greater or less compensation * * * than is specified in such public schedule." This section must be given full effect, for it overrides all State legislation *in pari materia* (*Gulf, Colorado & Santa Fe Ry.* v. *Hefley*, 158 U. S., 98, 102–3). Discussing somewhat similar provisions of the Colorado act in the Goodridge case, 149 U. S., at p. 691, Mr. Justice Brown said:

> So opposed is the policy of the act to secret rebates of this description that it requires a printed copy of the classification and schedule of rates to be posted conspicuously in each passenger station for the use of the patrons of the road that every one may be apprised not only of what the company will exact of him for a particular service, but what it exacts of every one else for the same service, *so that in fixing his own prices he may know precisely with what he has to compete.*

That the language of the second and sixth sections is construable as cutting off all individual discriminations not specially permitted by the statute is indicated, as we respectfully submit, by the twenty-second section, which makes special provision, among other things, for shipments by municipal governments, fairs and expositions; and makes special provision likewise for reduced rates to ministers of religion, inmates of soldiers' homes, etc. In the party rate case, indeed, these clauses were referred to as being illustrations rather than exceptions (145 U. S., at p. 278); but no question of discrimination between individuals was involved in that case; and it is

submitted that these remarks, which were *obiter*, are not confirmed by a complete review of the statute and authorities.

The fourth section—the so-called long and short haul clause—has no relation to discriminations between individual shippers. It deals only with discriminations between localities. It does, however, contain the same phrase "transportation * * * under substantially similar circumstances and conditions;" and this phrase was at once interpreted by the Interstate Commerce Commission, in cases arising under the fourth section, as in some instances enabling the railroads to charge more for the short than for the long haul simply on account of the existence of competition with other carriers, although its services are rendered under substantially similar circumstances and conditions in both cases in every other respect. From this interpretation it is attempted to argue that the special position of a fortunate individual with relation to a competing carrier is sufficient to justify giving him special rates, notwithstanding the strong language of the second and sixth sections. The interpretation is, however, untenable. It has been modified by the Commission itself; and in the Social Circle case it was exploded by the arguments of the railroad counsel, and seems to have been abandoned by the Commission's own counsel.

The long and short haul clause has no application whatever when the transportation, within its meaning, is performed under dissimilar circumstances and conditions. Hence, if the existence of a competing line of

carriers created such a dissimilarity, there would be no reason why a railroad in such a case should ever make application to the Commission for relief. The exception, if this were an exception, would be self-executing. The prohibition against charging more "for a shorter than for a longer distance for the same line in the same direction, the shorter being included within the longer distance," is expressly confined to cases of "the transportation of passengers or of like kind of property under substantially similar circumstances and conditions." Assume that the competition is effective enough to compel any, the least, lowering of the rate charged for the long haul,—then variations in the method or fierceness of the competition are immaterial. Assume that competition can create dissimilarity within the meaning of this section,—then, as was well said by the railroad counsel in the Social Circle case (Brief, p. 124): "It is the fact of competition, and not the kind of competition, that creates the substantial dissimilarity in the circumstances and conditions of transportion."

Hence, in applying to the Inter-state Commerce Commission for relief from the prohibition of the long and short haul clause, on account of competition of any kind, the applicant necessarily concedes that the transportation which it furnishes is in fact "under substantially similar circumstances and conditions."

Had the Commission, when its construction of this fourth section was determined upon, familiarized itself with the leading English cases bearing on the similar language of the second section, probably it would not

have fallen into so inconsistent a position. It would then have perceived that the "circumstances and conditions" were confined to the transportation afforded by the applicant itself, irrespective of any competition by other carriers. Failing to perceive this, and assuming that competition in some cases would introduce an element of dissimilarity into the "circumstances and conditions" of a railroad, the Commission proceeded to classify these cases as follows: "(1) When the competition is with carriers by water, which are not subject to the provisions of the statute; (2) when the competition is with foreign or other railroads which are not subject to the provisions of the statute; (3) in rare and peculiar cases of competition between railroads which are subject to the statute, when a strict application of the general rule of the statute would be destructive of legitimate competition." (*In re Louisville & Nashville R. R. Co.*, 1 Int. C. C., 31.) Five years later, the Commission expressed the opinion that they should not have included the third class above stated (*Railroad Commission of Georgia* v. *Clyde Steamship Co.*, 5 id., 324, 389); but this modification would not cure the radical error in interpretation. If competition can in any case be an element of dissimilarity within the meaning of this section, it is equally so whether the competition be by water or rail, whether it be from a foreign or a domestic rival, whether it be a "rare and peculiar" or familiar and everyday affair.

Considering the long and short haul clause by itself, and disregarding the analogies of the second section and the British Equality Clause, there are two consistent

interpretations possible: first, that any competition, rail or water, domestic or foreign, constitutes a dissimilarity; second, that the dissimilarity referred to in the statute relates only to the circumstances and conditions of the railroad's own services and transportation—to the amount carried, the speed of carriage, whether or not it be by through bill of lading, etc.,—so that the element of competition is only to be met by an application to the Interstate Commerce Commission. In the Social Circle case these questions were argued. Had the first of these constructions been the correct one, the decision of the lower courts would necessarily have been reversed upon the railroad's appeal, for the Commission had enforced the long and short haul clause where competition existed. This court affirmed the decision, however, and thus, if the above argument be correct, sustained the second construction above stated; although it used some phrases in the opinion which would be more compatible with the other. This second construction was the one given to the section by the bar in general when it was first adopted. (See *In re Cincinnati, Hamilton & Dayton R. R. Co.*, 6 Int. C. C., 323, 326, *per* Morrison, C.)

It is not the intention here to make an elaborate discussion of the fourth section. The question under that section is not one of very great practical importance, as the Interstate Commerce Commission grants and always will grant the very fullest liberty to compete with water routes, with foreign railroads, or with railroads contained wholly within the limits of a single State; so that it matters little whether this liberty of competition is a

statutory right or a special privilege. The discussion is not further elaborated, because it is not absolutely necessary that the phrase "under substantially similar circumstances and conditions" be given the same application in the second as in the fourth section. The purposes and operations of the two sections are diverse; and the sixth section, which has so vital a connection with the former, has no connection at all with the latter.

The second section has not as yet received authoritative judicial construction in this country in its application to discriminations between individual shippers. This is a case of first impression. Judicial construction has gone, so far, only to the extent of holding that the section does not prevent the distinction between wholesale and retail transportation rates, and that it does not prevent a distinction between through and local traffic.

The English courts, as we shall show, take precisely the same view of the section which is maintained in this brief; and the rulings of the Interstate Commerce Commission are likewise to the same effect. Among the special distinctions which it has held to be unlawful under the second section are the following: to persons shipping more than 30,000 tons a year over a given route (*Providence Coal Co.* v. *Providence & Worcester R. R. Co.*, 1 Int. C. C., 107); to commercial travelers (*Larrison* v. *Chicago & Grand Trunk R. R. Co.*, 1 id., 147); to explorers and settlers (*Smith* v. *Northern Pacific R. R. Co.*, 1 id., 208; *Elrey* v. *Illinois Central R. R. Co.*, 3 id., 652); to white men (*Councill* v. *Western & Atlantic R. R. Co.*, 1 id., 339; *Heard* v. *Georgia R. R. Co.*,

1 id., 428; 3 id., 111); and to various other classes of citizens. (*In re Boston & Maine R. R. Co.*, 5 id., 69; *Harvey* v. *Louisville & Nashville R. R. Co.*, 5 id., 153; see also *Hezel Milling Co.* v. *St. Louis, Alton & Terre Haute R. R. Co.*, 5 id., 57; *In re Louisville & Nashville R. R. Co.*, 5 id., 466.)

A case somewhat similar to the present was *Shamberg* v. *Delaware, Lackawanna & Western R. R. Co.*, 4 Int. C. C., 630, wherein it appeared that the railroad was paying yardage to a certain live stock express company, although the cattle expressed were kept in the express company's own yards; and, just as in the present case, the railroad was paying cartage to a shipper who did his own carting. Commissioner Bragg said (p. 648):

> If it be incumbent upon a common carrier of live stock under certain circumstances to furnish yardage, it is certainly not after delivery to consignee on his dock and in his own yard. The allowance of yardage on such a state of facts would seem to be a mere gratuity. We are of opinion, and so find, that the yardage allowance * * * is a reduction or rebate from the regular tariff rate, and as such forbidden by the act to regulate commerce.

Further commenting upon this rebate, and upon an excessive rental for live stock cars owned by the express company, which was held to be an undue preference under the third section of the act, the Commissioner says (p. 653–5):

> This case illustrates in a marked degree some of the serious abuses and evils the act to regulate commerce was intended to prevent. These abuses and evils are preferences in rates and facilities given by

> common carriers to large dealers in order to get their business. * * * A first class gold mine would have to be valuable indeed to be more profitable than such an arrangement as this for the large dealer; and the value of it to him consists of the advantages it gives him over other competitors and the burdens it imposes in his favor on them and upon the carrier no less than the fortune it gives him in money and property.
>
> When the carrier is asked to explain and justify these anomalous results, his reasons for it, as stated by himself, are * * * [among others] that it has been beneficial to him in enabling him to develop his business, and that if he had not obtained this business by this method, some other carrier would have done so. * * * The law in plainest terms forbids carriers to make or give undue preferences or advantages. This is a fundamental principle of transportation, and the equality of treatment intended by it is the underlying and paramount feature of the act to regulate commerce. In fact, the notorious and general disregard of this principle by carriers led more than any other transportation abuse to the exercise by the Government of its constitutional power of regulation. The end in view is the public welfare, by enforcing an impartial service on the part of the chartered transportation agencies of the country, and preventing favoritism among competitors in business that affords gain to one and subjects another to loss.

In thus holding that an opportunity to take away business from a rival railroad is not sufficient ground for discrimination, the Commission, it will be seen, but follow the interpretation which has been placed by the highest English courts upon the equality clause in the act of 1845.

Passages in certain opinions of this court are quoted to the contrary, and these opinions must therefore be considered.

The party rate case (*Interstate Commerce Commission* v. *Baltimore & Ohio R. R.*, 43 Fed. Rep., 37, aff. 145 U. S., 263) contains language in the opinion of Mr. Justice Jackson at circuit tending to sustain a right of railroad companies to make special contracts with individual shippers for rebates. This language is altogether *obiter*. No such contract was before the court, which was considering the lawfulness of carrying parties of ten or more at reduced rates—a custom in the passenger trade similar to that of charging less for carload lots than for smaller packages in the freight business. The opinion of this court, speaking through Mr. Justice Brown, indicates quite a contrary view. Thus, taking up the case which, in passenger traffic, is the counterpart of the case at bar, the court say (p. 276):

> For instance, it would be obviously unjust to charge A a greater sum than B for a single trip from Washington to Pittsburg.

The court quote with approval (p. 277) from Mr. Justice Blackburn in *Great Western Ry.* v. *Sutton*, L. R. 4 H. L. 226, 239:

> When it is sought to show that the charge is extortionate as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances.

They also approve (p. 283) the case of *Ransome* v. *Eastern Counties Ry.*, 1 C. B. N. S., 437, holding under the Undue Preference Clause that individuals can not be given reduced rates to secure their business, although in consideration of large shipments.

Mr. Justice Jackson's *dictum* is repeated by this court in the Social Circle case (*Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S., 184, 197); and in *Texas and Pacific Ry. Co.* v. *Same*, id. 197, 232; but here again it is *obiter*, and the bearing of the language on individual discriminations under the second and sixth sections of the act does not seem to have been called to its attention. The latter case related to shipments from Europe to inland points, via ocean and rail, *on through bills of lading* (p. 216)—"joint-rates from English ports to San Francisco" (p. 221). *No distinction was made between shippers or consignees.* The discrimination in rates was unlawful under the second section, if through bills of lading represent "a like kind of traffic" with local bills, and if the service rendered to the two classes of goods is rendered under circumstances and conditions substantially similar. In *Union Pacific Ry.* v. *United States*, 117 U. S., 355, 363, the two had been held not to be "the same kind of service" within the meaning of another statute; and in the party rate case, 145 U. S., at p. 277, the court had remarked, in discussing the second section of the act now under consideration, that a return passenger ticket need not be sold for double the price of a ticket one way, "since the services are not alike nor the circumstances and conditions substantially similar." The

court had thus already recognized a general principle that *the carriage of through passengers, or of passengers holding return tickets, and the carriage of passengers holding local one-way tickets, are not like services in the transportation of a like kind of traffic under substantially similar circumstances and conditions.* The Texas Pacific case simply applied the same principle to through freight traffic.

The decision in the Texas Pacific case has therefore no necessary bearing on the present one. The right to discriminate between individuals was not before the court for discussion. There is nothing to show that the court understood themselves to be discussing or deciding it. On the contrary, they quote the Denaby case, *infra*, in which the House of Lords held a discrimination between shippers, based on agreements to introduce foreign trade, to be unlawful. Shippers are treated by the court as constituting a homogeneous class. "Some charges might be unjust to shippers—others might be unjust to the carriers" (p. 219). The Commission "may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers" (p. 233).

There are, indeed, some expressions in this opinion also, which are construable so as to permit the railroad to favor a single shipper, to the disadvantage or destruction of all other shippers, whenever it may be to its own pecuniary advantage to do so, and whenever it can—as it usually can—find some peculiarity in the situation of the fortunate beneficiary. Under general principles such expressions, even if intended to bear such a construction, would not be binding upon the court. (*Cohens* v. *Virginia*,

6 Wheat., 264, 399; *Carroll* v. *Lessee of Carroll*, 16 How., 275, 286; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S., 429, 574.)

The position taken by the railroad counsel in the Texas Pacific case was similar to that which we take here. They argued (Brief, p. 37) that the service rendered was "carriage from London or Liverpool to San Francisco;" and said: "Every person may have this service at the same price. There is, therefore, no unjust discrimination." They quoted, as a "clear exposition" of their argument, the following remarks of Commissioner Cooley in 1 Int. C. C., 401: "Discrimination must consist in the doing for or allowing to one party or place what is denied to another; it cannot be predicated of action which, in itself, is impartial. * * * A regulation that is general and uniform is the opposite of discrimination."

The Texas Pacific case, therefore, does not support defendant's contention.

(2) The English decisions under the Equality Clause of 1845 and prior statutory provisions to the same effect are controlling. When Congress borrows a provision from the statute book of some other state or country, it is presumed that the judicial construction which has been placed upon that provision in its home courts is the construction which Congress intends shall be given to it here. (*McDonald* v. *Hovey*, 110 U. S., 619; *Allen* v. *St. Louis Bank*, 120 U. S., 20, 34; *Metropolitan R. R. Co.* v. *Moore*, 121 U. S., 558, 572.) That the second section of our Interstate Commerce Act is a substantial

adoption of the Equality Clause of 1845, and that this principle of construction is applicable, is recognized in the party rate case, both by Mr. Justice Jackson at circuit (43 Fed. Rep., 37, 53), and by Mr. Justice Brown, speaking for this court (145 U. S., 263, 284); and substantially also by Mr. Justice Shiras, speaking for this court, in the Texas Pacific case (162 U. S., 197, 222). The English phrase, "same circumstances," is narrower than ours. Ours was evidently intended to broaden the statutory prohibition.

The English cases under the Undue Preference Clause are very numerous. Those under the Equality Clause are comparatively few; and they are simple and emphatic. Their general principle may be stated as follows: *Under the Equality Clause, variations in situation of the individual shipper do not introduce an element of dissimilarity, except so far as they affect the cost of handling his goods.*

This principle has been laid down clearly and decisively in all the courts, including the House of Lords in the Sutton, Denaby and Eyershed cases. The latter case has been recently referred to by this court as "much modified, if not fully overruled" by later decisions of the House of Lords; but, as we shall show, its authority has never been shaken in its application to the Equality Clause of 1845, although certain *dicta* in the opinion, as this court correctly remarked, "are no longer law, so far as the second section of the act of 1854 is concerned." (162 U. S., at pp. 224, 230.) We shall take up the English cases in their chronological order.

Many of them are easier to read when the peculiar English system of carriers is borne in mind. The rail-

way law of that country has been largely fought out in litigations between the great carriers and the railway companies. Among the former may be mentioned the well known names of Pickford & Co. (of which firm Baxendale was long the head), Parker, Garton and Sutton. The origin and nature of the English carrier business is well stated by Judge Hammond in the Ionia case (*Interstate Commerce Commission* v. *Detroit, Grand Haven & Milwaukee Ry. Co.*, 74 Fed. Rep., at pp. 809–10.) Without discussing the merits of Judge Hammond's opinion—which will come before this court in the case numbered 539 on the docket, and which relates to a contest between localities, not individuals—we insert his clear description of the English carrier system:

> At first in England, if not here, the conception of a railroad was that it was like the King's highway—open to all who wished to go upon it for the transportation of goods along its lines, and the earliest acts authorizing their construction proceeding upon this theory, and the rules contained in the legislation for the regulation of the "tolls," "tonnage," "rates," and "charges" were based upon that conception of their use. The idea that the railroad owner should be himself a carrier of goods was at first almost wanting in the legislation concerning railroads. Very soon in the process of evolution he was authorized to become a carrier, others having the right, however, to share that business with him, the railroad owner most conveniently furnishing the motor power, whether of engines or other kinds, the trucks and carriages, just as he furnished the roadbed and lines of rails, and this whether he himself or some other contractor was the carrier of the

goods. But the business of carriage was at first almost exclusively in the hands of other contractors than railroad owners, they occupying a relation to the lines of railway very much like that which, in our day, the express companies in this country bear to them, only the business of these "carriers" was much more extensive, embracing all goods as well as small parcels for quick delivery. Paying the railroad company its "tonnage," "rates," "tolls," and "charges" for the use of the road, these outside carriers depended largely, if not wholly, for their profits upon compensation for the accessorial service of collection and delivery, including particularly the cartage of the goods. Naturally they charged a lump sum to their customers which covered the compensation for their own accessorial service and the charges which they paid to the railroad company, there being no separation or distinction between the two, any more than in the old fashion land carriage, as far as the shipper was concerned, but in the settlement between the railroad company and the "carrier" the distinction appeared.

When the railroad companies under the authority of subsequent legislation assumed for themselves the functions of "carrier" as contradistinguished from those of owner of the road and its appliances, they directly came into competition with those outside carriers who used their lines; and in the matter of collecting and delivering almost necessarily had themselves to do the accessorial work, including cartage, and must also necessarily either furnish the facilities for doing it or farm it out to others, sometimes doing one and sometimes the other; and in the process of farming out this collecting and delivery they oftentimes, if not always, engaged some carrier who was already equipped for the service in

> his own business, and he did the carting and other accessorial service for the goods of which the railroad companies became the carriers, as well as his own. The compensation for this service when the companies themselves were carriers was sometimes charged separately to the consignors and consignees, and sometimes included in a lump sum, including the railroad rate as well.

The methods adopted by the railways in attempting to secure a part or all of the profits of this carrier business were sometimes by a *quasi* partnership with a single carrier, either giving him an entire monopoly or special privileges of various kinds; sometimes by attempting to exclude all carriers from competition, as by making charges for cartage or other special services to everyone, whether he wanted the services or not, by imposing various conditions upon carriers as a class, by restricting them in hours of access to the station, or by discriminating against "packed parcels," which were the essence of their mode of conducting business. The "packed parcels" cases are numerous, and the leading case of *Sutton* v. *Great Western Ry. Co.* is one of them. Hence it may be convenient to set forth the nature of this business, and the method of attack against it, in the words of Mr. Justice Blackburn in that case (3 Hurlst. & Colt., 800, 845–6):

> The plaintiff proved that he was a person pursuing the trade of collecting small parcels for the same place, putting them together in one large parcel and sending that packed parcel, containing enclosures, by the railway. He also proved that the defendants published a tariff * * * By this tariff parcels between 1 cwt. and 500 lbs. weight

were divided into five classes, according to the kinds of goods which they contained, and charged at five different rates; but packed parcels were, according to this tariff, to be charged at the highest rate, and 50 per cent. additional. It is to be observed that, according to this tariff, the charge on packed parcels is always to be the same whatever be the nature of the contents of the enclosures; so that, if a packed parcel contains several packages all of the kind which would be comprised in the first or lowest class, nevertheless the highest charge and 50 per cent. more is to be charged; and if it contains packages all of the fifth or highest class the charge is to be no more. The company hold forth to the public that they make one uniform charge on all packed parcels, that is to say, on all parcels the contents of which come within the description of enclosures. * * * The plaintiff then proceeded to prove that his packed parcels were always charged, according to this profession of the company, as packed parcels, at the highest rate, with 50 per cent. added, and without any reference to the contents of the enclosures, which were generally unknown both to him and to the company, though their contents might be guessed at. The plaintiff then called witnesses for the purpose of proving that other persons sent packed parcels which were not charged at the same rate. * * * It amounted, in effect, to this, that four wholesale houses, Morley and Company, Copestake and Moore, Pawson and Morrison and Dillon, who were in the habit of sending large quantities of their own goods by defendants' railway, also habitually received enclosures for others, which they sent in packed parcels; that they did this daily, and on a great scale, and without any disguise on their part; and that they never were charged according

to the company's tariff as for packed parcels. No evidence was given that the company were ever directly informed that any one specific parcel was a packed parcel, but the evidence was that no questions were ever asked by the company.

The first English case is *Pickford et al* v. *Grand Junction Ry. Co.*, 10 M. & W., 398, decided in 1842. It came up under a special act (p. 416) which was substantially similar to the later Equality Clause. Defendant was engaged in carriage over its own and connecting lines from Manchester to Camden Town, whence the goods were conveyed into London by carts and vans. In order to get rid of the competition of carriers in general, it made a rate of 65 shillings per ton for packed parcels, including cartage between Camden Town and London; and refused to make any deduction to shippers in general who were willing to do their own carting. The railroad did, however, make a special contract with one firm of carriers, by which the latter received 10 shillings per ton for carting goods carried by the railway company "as common carriers." This arrangement gave the favored carriers a profit of from 2 to 5 shillings per ton on the cartage, and gave the railroad all the other profits of the carrier business; thus freezing out all of the other carrier firms. In an action for damages, the court, speaking through Baron Parke, said that by the statute, charges for carriage are to be made equal; "and it is clearly unreasonable and unequal to charge the same sum to a consignee who is willing to receive the goods at Camden Town, and one who requires them to be delivered at the London docks or elsewhere in London" (p. 424).

Parker v. *Great Western Ry. Co.*, 11 C. B., 545, decided in 1851, also related to "packed parcels." In order to break up the business of the carriers, the railroad enforced full charges for these parcels upon them, while relaxing its requirements as to other customers (pp. 560–2). Maule, J., said: "The real object of the company no doubt was to overcharge the carrier in order to absorb all the carrying business to themselves. They had no right to do this. They are bound to do the same work and at the same price for carriers as for other people." The court, speaking by Jervis, C. J., based its decision against the railroad in part upon the Equality Clause of 1844 (p. 582).

In another instance also the court discriminated against the carriers with relation to charges for parcels (pp. 562–4), and in condemning the practice as a violation of the Equality Clause of 1844, Jervis, C. J., said:

> These goods, it is said, are of the like description and quality and conveyed in and propelled by a like carriage and engine and *under the like circumstances;* for, that the fact of the person employing the company to carry the goods being the ultimate consignee or not, does not give rise to a difference of *circumstances* to justify an inequality of charge. To the extent of the difference between what the company would charge for the goods when directed to one or to different ultimate consignees I am of opinion that the plaintiff is entitled to recover the overcharge in this action for money had and received.

The italicizations are those of the learned chief justice himself.

On the following day the same court decided the case of *Edwards* v. *Great Western Railway Co.*, 11 C. B., 588.

The principle of the decision is the same, and Jervis, C. J., substantially repeats the same language with reference to similarity or difference in circumstances (pp. 647–8).

Crouch v. *London & Northwestern Ry. Co.*, 14 C. B., 255, also a "packed parcels" case, was decided in January, 1854, upon similar principles.

Crouch v. *Great Northern Ry. Co.*, 9 Exch., 556, decided in February, 1854, was also a "packed parcels" case. It was tried before Erle, J., whose opinions afterwards as chief justice were so consistently and so unsuccessfully favorable to the railroads upon these questions. The question arose under the Equality Clause of 1845, and the contention was (p. 559) "that the plaintiff, though a carrier, ought nevertheless to be upon the same footing as the rest of the public as being a person using the company's line under like circumstances." Erle, J., decided in favor of the railroad, but was reversed by the Exchequer, Baron Parke stating that the court was bound by previous decisions of the Common Pleas, while Baron Martin intimates a concurrence in the reasoning of those decisions.

When *Baxendale* v. *Great Western Ry. Co.*, 14 C. B. N. S., 1, another "packed parcels" case under the Equality Clause, reached the Court of Common Pleas, Erle, J., had become chief justice of that court. He wrote a long opinion in favor of the railroad, but was overruled by his colleagues, who held (16 C. B. N. S., at p. 137) "that the company are still bound to charge *equally*, and cannot lawfully demand for the carriage of

parcels from station to station a sum which shall include the cost of collection and delivery, and so impose an unequal burthen on those who do not require the performance of this latter service at their hands; and that money had and received will lie to recover back sums demanded and received in excess." The railroad then brought the case into the Exchequer Chamber, where it became one of new impression. It was argued by able counsel before seven judges, and decided in February, 1864, unanimously affirming the decision below (16 C. B. N. S., 137).

The next case was *Sutton* v. *Great Western Ry. Co.*, also a "packed parcels" case, and the one from which we have quoted the facts *in extenso* from the opinion of Mr. Justice Blackburn. The Exchequer Chamber followed the cases above quoted, Erle, C. J., alone dissenting; and a further writ of error was obtained.

This brings us to the first of the two exhaustive discussions in the House of Lords (*Great Western Railway Co.* v. *Sutton*, L. R. 4 H. L., 226, decided in 1869). The facts have already been stated. The action was for money had and received. The evidence tended to show, but not conclusively, that packed parcels of other customers were not subjected to the same strict treatment as those of the carriers. The trial judge (Martin, B.) had left this question of fact to the jury; and, on an affirmative finding, had *directed a verdict* for the plaintiff (p. 230). He had thus ruled, *as matter of law*, that carriers were "under the same circumstances" with all other customers. This had been affirmed in Exchequer

Chamber by Cockburn, C. J., Byles, Willes, Blackburn, Keating, Mellor and Shee, JJ., Erle, C. J., dissenting. The House of Lords now summoned the judges, and Willes, Blackburn, Keating and Lush, JJ., Bramwell and Pigott, BB., attended. The case was argued June 30, July 2 and 3, 1868, and their answers were given April 22, 1869. All but Bramwell, B., concurred in affirming the judgment; and his dissent was upon another point.

It will be noticed that the opinions use the phrase "like circumstances" in lieu of "same circumstances;" the former being that used in the act of 1844, which, as well as the act of 1845, was applicable to the case (p. 257).

Mr. Justice Blackburn said (p. 239):

> It would be the very essence of the case to prove that the goods were "of the like description and carried under the like circumstances." But I think that this applies to the description of the *goods* and the circumstances of the *carriage*, and not to the trade of the consignor or consignee.

After reviewing all the authorities, and discussing other questions, he said (pp. 245–6):

> The next objection is, that the circumstances are not the same. I do not think it can be said as a matter of law that they are the same, but I think the jury might on this evidence properly draw the conclusion that they were. I have already intimated to your Lordships my opinion that *the circumstances must be those relating to the carriage, not to the consignor*, and that the fact that the plaintiff was a rival carrier does not, in itself, make a difference in

> the circumstances such as to justify a difference in the charge under the statute; it rather makes against the defendants as supplying a motive for an attempt to evade the statutable provision; but I think there were matters in favour of the defendants which the jury had to consider. Seeing that the plaintiff from the nature of his trade brought all his parcels packed, whilst the wholesale houses brought only about 10 per cent. of theirs packed, it was for the jury to consider whether the failure on the part of the defendants to charge the wholesale houses for their packed parcels was owing to the difficulty of detecting and charging for them or not. I think if the circumstances of the wholesale houses sending nine unpacked parcels along with a packed one, made it so difficult to detect and charge for it, as to make it impracticable so to do, that would be a difference in the circumstances.

In other words, the learned justice—and Keating and Lush, JJ., and Pigott, B., concurred in his opinion—held that all classes of shippers were "under the like circumstances" *as matter of law*; but that whether the railroad was guilty of discrimination in failing to hunt for "packed parcels," where they were concealed among other parcels nine times as numerous, was a question of fact for the jury.

Mr. Justice Willes delivered a separate opinion, in which he said (pp. 247, 249):

> The question what is the meaning of the equality clause when it speaks of things of "like description" conveyed under "the like circumstances" ought, I think, to be answered by saying that things are of a "like description" when, although their composition and structure are not "identical,"

> which would be expressed by "the same description," not "like description," they are similar in those qualities which affect the risk and expense of carriage, and that they are conveyed under like circumstances where the route, risk, and expense are in the opinion of a jury the same, otherwise not. * * * In effect I think the phrase "like description" is exhausted upon the goods, and "like circumstances" upon the route, expense, and risk of carriage, and that neither can be extended to the personal qualities of the individual who sends the goods.

After nearly two months' further consideration, the decision was affirmed on July 13, 1869, Lord Chelmsford delivering the opinion, with the reasoning of which Lords Colonsay and Cairns fully agreed (p. 264). He expressly disapproves the opinion of Erle, C. J., in the Baxendale case, *supra*, and says that (p. 259):

> The intention of the legislature was to place all persons having their goods carried by the railway upon an equal footing.

As to the phrase here under consideration, he says (p. 260):

> I have felt greater difficulty in ascertaining the meaning of the words "under the same" or "under like circumstances." I do not see, however, how they can relate to anything else than the conveyance of the goods.

The question thus fully discussed and deliberately settled in the Sutton case controlled the decision in the Evershed case. The latter was closely like the case at bar. It was not a case of an "intercepting carrier." It

was an action brought by one brewer, complaining of favors to another; and the railroad's defense was that the favored brewer was so advantageously situated with reference to a competing line, that, without affording him special privileges, his business could not be had. The Eversheld case was decided partly under the Equality Clause, partly under the Undue Preference Clause. In the latter phase it has been overruled; not because the special favor did not constitute an undue preference, but because an action for money had and received does not lie for violations of the act of 1854. Its interpretation of the Equality Clause has never been questioned in the British courts. The principle of its decision is that *shipments in the same city are under the same circumstances, although part are by shippers who are, part by shippers who are not, connected by sidings with a rival railroad.*

Eversheld v. *London & North Western Railway Co.*, 2 Q. B. D., 254, was decided in 1877. It was an action for money had and received, to recover overcharges. Plaintiff was a brewer at Burton-on-Trent. Three firms of rival brewers had sidings on the Midland Railway, a rival line reaching the same city, thus doing their own loading and unloading, and requiring no station accommodation; some even having their own locomotives. For these services there is allowed a customary and fair rebate of 9*d.* per ton, as they are included in the railroads' "station to station rate." The railroads do not supply cartage at Burton-on-Trent without extra charge. When they do cart, they charge 1*s.* per ton. In order to get the business of the brewers who had sidings on the Midland road, the North Western allowed them the 9*d.*

rebate without consideration therefor, giving them also cartage, loading, unloading, and station accommodation free. Plaintiff obtained an injunction from the Railway Commission, on the ground of undue preference; and the North Western thus lost the trade of the rival brewers, who went back to the Midland. Plaintiff then brought this action to recover at the rate of 1*s.* 9*d.* per ton as his damages for a period of six years prior to suit. Defendant's counsel insisted that plaintiff had suffered nothing, the only injury being to the Midland road, and that the rival brewers only reaped the benefit of their outlay in constructing sidings. Mellor, J. (Lush, J., concurring), in a very clear opinion, held the rebate a violation both of the Equality Clause and of the Undue Preference Clause; that individual rebates can not be given "unless, at all events, there is a sufficient consideration for such reduction, which shall lessen the cost to the company of the conveyance of their traffic, or some other equivalent or other services are rendered to them by such individuals in relation to such traffic" (p. 267).

In November, 1877, the judgment was affirmed by the Court of Appeals (3 Q. B. D., 134), the decision again being put upon both clauses. Lord Justice Bramwell discussed the cartage very clearly (pp. 142–4):

> I am clearly of opinion that the sum of money charged to the three firms does include a charge for collecting, and loading, and unloading their goods. It is stated in the case that the defendants did the cartage for the three firms gratuitously; but we are empowered to draw inferences of fact, and I come to the conclusion that this statement is not strictly accurate. * * * In reality the defendants receive

from the three firms one sum, which includes payment for carriage upon the railway, and also payment for cartage. * * * Undoubtedly it seems a little hard at first sight that by deciding in favour of the plaintiff the defendants will probably lose the whole traffic of the three firms; but after further consideration it will be found that the hardship is scarcely real, for the defendants can keep a share in the traffic of the three firms provided they carry the plaintiff's goods at the same rate as those of the three firms. * * * It was also urged that the three firms had something in the nature of a natural advantage to the benefit of which they were entitled in their dealing with the defendants. I am of opinion that is not so. They have indeed an advantage which enables them to put a pressure on the defendants, but if the defendants yield to it, they must give an equal advantage to the plaintiff. * * * I feel sure that our decision carries into effect the intention of the legislature. It was manifest that railway companies would enjoy almost a monopoly of traffic, and it was thought right that all persons dealing with them should be put upon an equality.

Lord Justice Brett said (p. 145):

Now it seems to me that the plaintiff and the three firms of brewers in their relations with the defendants were under the same circumstances in every material respect. The defendants did the same things for both the plaintiff and the three firms of brewers: in each case they collected and carted the beer through the town, they took it to their station, they then put the beer into similar trains and conveyed it over the same lines of rails, and, as may be assumed for the purposes of this discussion, the

quantity carried for the plaintiff and the three firms was the same. Between what the defendants did for the plaintiff, and what they did for the three firms, no difference exists; but the charges which the defendants made to the plaintiff and the charges which they made to the three firms in respect of the same services were different.

Lord Justice Cotton said (p. 148):

> In order to render lawful an inequality of charge the goods must be carried under different circumstances, and goods are carried under the same circumstances when the cost to the railway company of carrying them is the same.

In July, 1878, the judgment was affirmed by the House of Lords (3 App. Cas., 1029). Lord Cairns said (p. 1035):

> Now as a matter of policy and expediency, it may well be that the appellants have good reasons for treating those other firms in the way they do; it may be that if they do not do that, these other firms, from the natural advantages of the situation which they have been able to occupy, will send their goods by another railway and not by the railway of the appellants. But with those considerations the plaintiff in the action has nothing to do. That is exactly one of those things which Parliament has not left open to railway companies to judge of—whether in that way they will equalize their capacity for competing with other lines or not. The one right, to my mind, the clear and undoubted right, of a public trader is to see that he is receiving from a railway company equal treatment with other traders of the same kind doing the same business and supplying the same traffic.

Lord Hatherley said (pp. 1036–7):

> The charge must be the same to all for the same services, performed in the same manner, for carrying the goods for the same distance, and for similar services rendered in every other way; it not being a case of a wholesale charge compared with a retail charge and the like, which would be a difference of circumstances, and has been decided to be an essential difference.
>
> My Lords, in the case we have before us, there is really no essential difference of circumstances; the only difference is that the two firms of brewers are more favourably situated for dealing with another railway company than the other brewer is.

Lord Blackburn said (p. 1038):

> What the legislature has clearly said is that the tolls must be charged equally to all persons under the same circumstances. I think that means under similar circumstances as to the goods, not as to the person. I do not think the person comes into the question at all.

Lord Gordon said (p. 1039):

> The words in the section, "under the same circumstances," are certainly words calculated to give rise to a good deal of litigation in their construction; but we see how very carefully the learned judges in the Queen's Bench Division and in the Court of Appeal applied their minds to it, and we find that they are unanimous upon the point. I listened with every attention to the arguments submitted to us by the appellants' counsel, but I must say that they failed to bring before my mind distinctly any good grounds of complaint against the judgments of the courts below.

The Denaby case (*Manchester, Sheffield & Lincolnshire Railway Co.* v. *Denaby Main Colliery Co.*, 13 Q. B. D., 674; 14 Q. B. D., 209; 11 App. Cas., 97; decided in 1884 and 1885) was argued by leading counsel, including Sir Richard Webster for the colliery and Sir Farrer Herschell for the railroad. It was mainly a contest between different localities, in which the principle of "group rates" was attacked. To this extent the Queen's Bench decided in favor of the colliery, but was reversed by the Court of Appeal. The opinion of the latter court was delivered by Lord Justice Lindley (Brett, M. R., and Cotton, L. J., concurring). Upon the Equality Clause he said (14 Q. B. D., p. 224), citing the Sutton and Evershed cases as authority:

> The expression, "under the like circumstances," has been the subject of decision, and must now be taken to mean under like circumstances as regards the services performed by the railway company in receiving, carrying, and delivering the goods.

The House of Lords affirmed this decision as to the "group rates," and overruled the Evershed case in so far as it held that an action for damages could be based upon the Undue Preference Clause; but it reversed the decision upon two other questions, holding that the Equality Clause had been violated. These questions arose as follows (11 App. Cas., at pp. 98–104):

The colliery is situated in South Yorkshire. Among its customers is one Bannister, a coal merchant at the port of Grimsby, on the same line of railroad. The railroad induced the Hamburg-American line of steamers to make Grimsby a coaling station. Those steamers had

been using Welsh coal; but a rebate of 10*d.* or 1*s.* per ton would induce them to use South Yorkshire coal. To this end, and in hopes of introducing this coal into the West Indies, the railroad agreed to give Bannister a rebate of 8*d.* per ton upon coal brought from any colliery in South Yorkshire and shipped by the Hamburg-American steamers. He was not bound to ship any definite quantity "and the services performed by the plaintiffs in respect of such coal were identical with those performed by them in respect of any other coal shipped at Grimsby." Bannister got no rebate upon any other coal for shipment there.

A similar rebate of 6d. per ton, under the name of "agency commission," was also given to Bannister upon all coal shipped by him from Grimsby to English ports south of Harwich. This was a *bona fide* arrangement, in consideration of Bannister's undertaking "to develop the trade, to provide vessels, and to run the risks incidental to the working of such a traffic;" there having been little of this trade before.

No opportunity was given to any one else to obtain these rebates; the case being thus distinguished from that of the Texas Pacific, *supra*.

Lord Selborne said (pp. 115–6):

> All these coals are proved to have been carried "only over the same portion of the line, and under the same circumstances," as the appellants' coals. The motives and reasons for making these allowances are plainly not material, as against the appellants' claim to have their coals carried on the same terms.

> The opinion of the majority of the judges in *Sutton's Case*, delivered by Blackburn, J., and adopted by Lord Chelmsford, Lord Cairns and Lord Colonsay, and that of the whole court in *Oxlade's Case*, on the Staffordshire traffic, to which may be added *Evershed's Case*, seem to me decisive on this point.

Lord Blackburn says (pp. 120, 122):

> I think that it is finally settled by *Great Western Railway Company* v. *Sutton* and *Evershed's Case* that if passing over the same portion of the railway (a fact which was not disputed in either of these cases), the obligation to charge, in respect of goods of the same description, equally, is imposed if they are "under the same circumstances," and that the circumstances are those relating to the carriage of the goods, not the person of the sender; that the fact that the persons who are charged less are, as in *Evershed's Case*, so situated that they can go by another route, and probably will do so if charged as much as the charge made to the complaining party, is not a circumstance justifying an unequal charge. Neither is it a difference of circumstances justifying an inequality of charge that those whom the railway charges less are seeking to develop a new trade. * * * And I do not think that it makes any difference in the "circumstances," where coals are delivered at Grimsby for shipment, that one parcel is shipped on a vessel bound for one port and another parcel on a vessel bound for another.

Lords Halsbury and FitzGerald concurred in the decision.

The Phipps case (*Phipps* v. *London & North Western Ry. Co.*, L. R. [1892] Q. B. D., 229) was a contest

between different localities, under the Undue Preference Clause. These localities were at distances of eleven miles apart. The case has no relevance to the one here at bar, except in its references to the Eversheds decision. It is noticeable that Sir Richard Webster now appeared for the railroad, while Sir Farrer Herschell, having become Lord Chancellor, delivered the main opinion in the Court of Appeal. The former, in his argument, did not dispute the Eversheds case, but distinguished it as turning only upon the Equality Clause (pp. 234–5). Lord Herschell said (pp. 249–50):

> No doubt, when you are dealing with the Railways Clauses Consolidation Act, 1845, as Lord Blackburn points out in his judgment in *Eversheds's Case*, the words of the equality clause have no elasticity at all; there are no outside circumstances to be taken into consideration, and it is not a question of regarding the position of the one trader as compared with the other, and then saying whether there is any undue preference. It is an absolute rigid equality which is demanded by the statute. Lord Blackburn said it might have been very reasonable even in that case to allow other considerations to weigh, but that the legislature had not done so.

Lord Justice Lindley said (p. 251):

> The observations which I have made have no reference to the equality clause. The equality clause imposes a rigid rule; and putting it shortly, it is to the effect that for the same service the same sum is to be paid.

Lord Justice Kay said simply that the Eversheds case "was decided upon the Equality Clause" (p. 255).

In *Murray* v. *Glasgow & South Western Ry. Co.*, 11 Sessions Cases, 4th Series, 205, 216, Lord Shand said:

> The case of Evershed is substantially under the act of 1845, and undoubtedly the provisions of that act were sufficient for its decision.

Cases under the Undue Preference Clause of 1854 are, as already remarked, not directly in point; although many discriminations, like this, are obnoxious to both. Charges may be unequal without either being undue. Undue preferences may involve no inequality of charge. The following English cases have, therefore, only a remote bearing: *Ransome* v. *Eastern Counties Ry. Co.*, 1 C. B. N. S., 437; *Oxlade* v. *North Eastern Ry. Co.*, id., 454; *Baxendale* v. *North Devon Ry. Co.*, 3 C. B. N. S., 324; *Harris* v. *Cockermouth & Workington Ry. Co.*, id., 693; *Ransome* v. *Eastern Counties Ry. Co.*, 4 C. B. N. S., 135; *Baxendale* v. *Great Western Ry. Co.* (Bristol case), 5 C. B. N. S., 309; Do. (Reading case), id., 336; *Nicholson* v. *Same*, id., 366; *Garton* v. *Bristol & Exeter Ry. Co.*, 1 B. & S., 112; *Baxendale* v. *Same*, 11 C. B. N. S., 787; *Palmer* v. *London & South Western Ry. Co.*, L. R. 1 C. P., 588; *West* v. *Same*, L. R. 5 C. P., 622; *Palmer* v. *London, Brighton & South Coast Ry. Co.*, L. R. 6 C. P., 194; *Parkinson* v. *Same*, id., 554; *Thompson* v. *London & North Western Ry. Co.*, 2 Nev. & Macn., 115; *Bell* v. *Same*, id., 185; *Denaby Co.* v. *Manchester, Sheffield & Lincolnshire Ry. Co.*, 3 Nev. & Macn., 426; *Diphwys Slate Co.* v. *Festiniog Ry. Co.*, 2 Nev. & Macn., 73; *Budd* v. *London & North Western Ry. Co.*, 4 Br. & Macn., 393; *Menzies* v. *Caledonian Ry. Co.*, 5 R. & C. T. C., 306.

It may be remarked, however, that in the Reading case the allowance of cartage to all but one class of customers is held to be an undue preference, the fallacy of "free cartage" to favored customers being very clearly shown by Cockburn, C. J.

In *Thompson* v. *London & North Western Ry. Co.*, 2 Nev. & Maen., 115, the facts were the same as in Evershed's case; and the special rebates were held to be violations of the Undue Preference Clause, the commission saying: "The local relation of the Midland to the traffic is such that it must have the preference."

(3) It is evidently the intent of the statute that all shippers at the same railroad station should receive equal treatment; and that all should be charged the same rate and given the same services and privileges. No mischief called so loudly for a remedy as the practise so generally prevalent in 1887 of discrimination between individual shippers. "The system of carrying under special contracts, below schedule rates, is the most serious evil connected with our present methods of railroad management. Trade adjusts itself to almost any system of classification, and sometimes even to local discriminations. But where two individuals, under like circumstances, receive different treatment, no such adjustment is possible." (Hadley, Railroad Transportation, 1885, p. 119.) This system and policy were said by Senator Cullom's committee to foster monopoly, enrich favored shippers, prevent free competition in many lines of trade, and "introduce an element of uncertainty into legitimate business that greatly retards the development of our industries and

commerce." (Sen. Rep. No. 46; 49th Congr., 1st Sess.; Jan. 18, 1886, p. 181.) "Individual favoritism is the greatest evil chargeable against the management of the transportation system of the United States," etc. (p. 188).

It is proper, in searching for the mischiefs which a statute is intended to remedy, and which thus illuminate the meaning of the statute, to consider those reports of committees which served as the basis for legislative consideration. Such reports seem not to be subject to the objections which (*Aldridge* v. *Williams*, 3 How., 1, 24; *United States* v. *Union Pacific Ry. Co.*, 91 U. S., 72, 79; *District of Columbia* v. *Washington Market Co.*, 108 U. S., 243, 254) prevent the courts from quoting the interpretations and arguments of individual legislators in debate. They have been held a proper source from which to glean information as to the Congressional design. (*Holy Trinity Church* v. *United States*, 143 U. S., 457, 464; *The Delaware*, 161 U. S., 459, 472.)

Senator Cullom's report, just cited, shows unmistakably that successful competition with another railroad was not intended to be an excuse for discrimination between shippers at the same terminus. The very case which he cites as a most typical and flagrant instance of the abuses which the Senate committee are striving to remedy is one of this kind (pp. 188–9):

> One reference to the testimony must suffice to illustrate the universality of individual favoritism, the reasons which influence the railroads in favoring one shipper to the ruin of another, and the injustice of the system. Mr. C. M. Wicker, of Chicago, a former railroad official of many years' experience, was asked if he knew anything of discriminations

upon the part of transportation companies as between individuals or localities, and testified as follows:

* * * * *

"Mr. WICKER. I am speaking now of when I was a railroad man. Here is quite a grain point in Iowa, where there are five or six elevators. As a railroad man, I would try and hold all those dealers on a 'level keel,' and give them all the same tariff rate. But suppose there was a road 5 or 6 or 8 miles across the country, and those dealers should begin to drop in on me every day or two and tell me that that road across the country was reaching within a mile or two of our station and drawing to itself all the grain. You might say that it would be the just and right thing to do to give all the five or six dealers at this station a special rate to meet that competition through the country. But, as a railroad man, I can accomplish the purpose better by picking out one good, smart, live man, and, giving him a concession of three or four cents a hundred, let him go there and scoop the business. I would get the tonnage, and that is what I want. But if I give it to the five, it is known in a very short time. * * * When you take in these people at the station on a private rebate, you might as well make it public and lose what you intend to accomplish. You can take hold of one man and build him up at the expense of others, and the railroad will get the tonnage.

"Senator HARRIS. The effect is to build that one man up and destroy the others?

"Mr. WICKER. Yes, sir; but it accomplishes the purposes of the road better than to build up the six."

The practise of discrimination between individual shippers was disastrous alike to stockholders, bondholders and the community at large. The legitimate gains

of the railroads were almost inappreciable; but a few conspirators inside and outside of the railroad directories were enriched, while great numbers of honest business men were driven out of competition all over the country. The Standard Oil Company was only the most famous and typical instance. This and a few others of the most successful monopolies built up upon railroad discriminations may have cheapened some commodities; but at a price which the nation was unwilling to pay. In their train were all the petty rebates and advantages which in every locality were used to help one merchant at the expense of his neighbors.

Many excuses were made for these rebates. Sometimes they were to forestall competition, or to get away business from a rival line. Sometimes they were to introduce new industries, or develop old ones. Sometimes they were supposed to be in consideration of some special contract for the benefit of the railroad, as in the Goodridge case (149 U. S., 680).

These illicit agreements cannot be stopped except by prohibiting discriminations altogether. If a railroad can discriminate in favor of one man, because he has a siding on a rival line, it can discriminate in favor of another man to prevent his building a siding, or, if he is not near enough for that, to prevent his connecting by a spur track; or, if he is not near enough for that, to compensate for longer cartage or heavier grades or worse paving of streets. No individual is in precisely the same situation with his neighbors; and if discrimination among individuals is allowable, the Interstate Commerce

Commission will be employed in deciding questions of fact, while any attempt to enforce penally the second section will be met with arguments similar to those so strongly put by Mr. Justice Brewer in a case arising under the third section and relied upon by this defendant's counsel (*Tozer* v. *United States*, 52 Fed. Rep., 917; see also dissenting opinion in *Interstate Commerce Commission* v. *Brimson*, 155 U. S., at p. 6; and IV, *infra*).

All of these defects and difficulties are cured by adherence to the interpretation so deliberately and authoritatively given to the similar English statute.

It is not necessary for the purposes of the case at bar to discuss exhaustively the instances in which discrimination may or may not be permitted by our Equality Clause. It seems, however, to be the custom in interstate commerce cases to cover a great deal more ground in discussion than the case requires; and therefore an outline of the views of the undersigned may be excusable.

Differences in cost of transportation are always to be considered; but a difference in cost is not always enough to justify a special rebate. There are some decisions which seem to support a theory that any saving in cost is enough to constitute a difference in circumstances and to justify a preference; but the weight of authority is now to the contrary, since the practical results of such a theory have been more clearly perceived. It would probably be a slight saving to any railroad if by means of rebates it could concentrate the whole business of any given community in the hands of one merchant; but the saving would be slight and the political and social results

disastrous. The idea of making cost of service the sole test was an inheritance from earlier industrial conditions. It was abandoned at the start by the railroads themselves. This is shown in every schedule of freight classification. Why does a railroad charge $1 for carrying a given amount of coal a given distance, and say $7 for carrying the same amount of dry-goods the same distance? Simply because it pays more than the operating expenses to carry the coal at that price, while the business could not be had at any higher price; but to carry all other kinds of freight at the same rate would fail to pay fixed charges. The public allows a railroad to charge more than cost of service and a reasonable profit thereon for carrying high class freight because the railroad, while a monopoly, is a public servant whose continued life and efficiency is required by public policy. Special discriminations in favor of individuals, even when somewhat profitable to the railroad, are prohibited because the latter, being a public servant, is bound to serve all of the public alike; and because it is against the public interest to permit any system of discrimination which may become a cover for favoritism, or may unnecessarily widen the distance between the rich and the poor.

We quote from the opinion of Lord Chief Justice Cockburn in the Reading case (5 C. B. N. S., at pp. 350–4):

> It is abundantly clear, from the statutory enactments which enjoin on railway companies the obligation to afford accommodation on equal and reasonable terms, and from the provisions of the statute by which

jurisdiction is given to this court against the affording of undue preference or the imposing of undue prejudice or disadvantage, that it was not the intention of the legislature to leave to railway companies the unfettered exercise of their rights as proprietors of their respective lines; but, in return for the great powers which it has conceded to them, and for the monopoly of the carrying business of the country, which in a great degree they have been enabled to acquire, has imposed on them the obligation of affording accommodation on equal terms to the whole of the public.

The policy and justice of such a requirement are manifest, it being obvious that the powers of a railway company, and its monopoly, under the impossibility of all competition, might otherwise be converted into a means of very grievous oppression, by a difference in point of charge or in point of accommodation made in favor of one man at the expense of another, or by disadvantages in respect either of charge or accommodation imposed on one as compared with another. And it is plain that the oppressive effects of such inequality will be equally great whether its motive and operation be to benefit third parties or the railway company itself. * * * Greater difficulty and nicety perhaps arises in dealing with cases in which the purpose and effect of the thing complained of is, the benefit of the company in their character of proprietors of the particular railway. In these cases, the court might feel greater reluctance to interpose, partly from an unwillingness to interfere with parties in the management of their own affairs for their own advantage, partly from a disposition to give companies credit for acting on an enlightened view of their own interests as identified with those of the public; yet, if the court became

> clearly satisfied that a company was seeking to promote its own advantage by establishing an inequality which was unreasonable under the circumstances and operated unfairly and injuriously upon particular individuals, or that it was affording to one person or set of persons an advantage which it would not afford to another under similar circumstances, this court would not hesitate to interfere to prevent such a result, although by so doing they might prevent the company from securing all the profit that it might otherwise derive from the use of its property. * * * So, again, if an arrangement were made by a railway company whereby persons bringing a larger amount of traffic to the railway should have their goods carried on more favourable terms than those bringing a less quantity, although the court might uphold such an arrangement as an ordinary incident of commercial economy, provided the same advantage were extended to all persons under the like circumstances; yet it would assuredly insist on the latter condition, and would interfere in the case of any special agreement by which the company had secured to a particular individual the benefit of such an agreement, to the exclusion of others, or even where an attempt had been made, by keeping the agreement secret, to make it operate unduly to the prejudice of third parties.

The following seem to be proper cases for discriminations in rates:

(*a*) Through traffic as distinguished from local traffic. (Texas Pacific case, *supra*.) If *Regan* v. *Aiken*, 9 Lea, 609, is good law, or would be good law under the Interstate Commerce Act, it would be on this principle, as the merchants there favored were at such distances as to alter conditions entirely.

(*b*) Carload lots as distinguished from smaller amounts of freight. It has always been conceded that reduced rates are proper for carload lots, which produce economy in many ways. No larger unit has ever been attempted by the railroad companies. Hence, whether a further reduction would be proper in the case of larger lots has never been a practical subject of discussion. Such a rebate would enure to the benefit only of the largest shippers, and would not appreciably result in a saving of cost (Cullom report, p. 191).

(*c*) Form or condition of shipment is conceded to be a proper element for consideration; as, whether grain is shipped in sacks, or loose in carloads.

(*d*) Speed in transportation, when unusual speed is called for, would seem to be a proper subject for a higher charge.

(*e*) On the other hand, if the shipper agrees to await the convenience of the railway, his agreement might be considered a proper ground for reduced rates; for a railroad is thus enabled to secure fuller trainloads and prevent hauling of empty cars. It also, by obtaining full carloads, saves many incidental expenses, such as switching, elevator charges, etc., which are regulated by the carload, irrespective of how much the car contains.

(*f*) The direction of the traffic is also an important element. The traffic may be very heavy from A to B and very light from B to A, necessitating much hauling of empty cars. It is therefore proper to charge reduced rates from B to A.

(*g*) It is of course proper to charge higher rates when the goods are carried at carrier's risk than when they are carried at shipper's risk.

(*h*) The station to station rate ordinarily includes some terminal services, such as station accommodations, loading and unloading. At some localities it includes also extra services such as cartage. Customers who have sidings along the track are able to dispense with these services, as in the case of Bruening and the Pan Handle road. This saving of labor to the railroad company seems to have been regarded in Bruening's case as a fair consideration for the privilege of maintaining the siding. The English cases sustain rebates to persons similarly situated in consideration of their dispensing with the ordinary terminal services; but this may easily become an abuse, and the amount of rebate allowed is very closely scrutinized. (*Thompson* v. *London & North Western Ry. Co.*, 2 Nev. & Macn., 115; *Bell* v. *Same*, id., 185.) The sixth section of the Interstate Commerce Act requires that the printed schedules shall "state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges." In this country, therefore, there can be no rebate allowed from the plain station to station rate on account of any saving in terminal services. If the railroad desires to make such rebates, it must reduce its scheduled station to station rate and make its terminal charges separately.

If cartage is furnished by the railroad, it is questionable whether the charge should not be separated so that

persons who do not desire it need not pay it. (Reading case, *supra*; *Baxendale* v. *Great Western Ry. Co.*, 16 C. B. N. S., 137.)

The following seem not to be proper cases for discriminations in rates:

(*a*) Rebates asked in consideration of a guarantee of large annual shipments. This was held a proper ground for discrimination in *Nicholson* v. *Great Western Ry. Co.*, 5 C. B. N. S., 366; but that case has been subjected to much criticism, and it was decided under the Undue Preference Clause, not the Equality Clause. It may be doubted whether it would be regarded as an authority upon the latter clause in the English courts, even if it is authority there upon the former. (See Harris case, *infra*; *Diphwys Slate Co.* v. *Festiniog Ry. Co.*, 2 Nev. & Macn., 73.) A similar discrimination was permitted in *Borda* v. *Railroad Co.*, 141 Pa. St., 484; but the contrary has been held, even at common law, in *Hays* v. *Pennsylvania Co.*, 12 Fed. Rep., 309, 314; *Kinsley* v. *Buffalo, New York & Pittsburgh R. R. Co.*, 37 Fed. Rep., 181; and *Louisville, Evansville & St. Louis Cons. R. R. Co.* v. *Wilson*, 132 Ind., 517, 524.

The opinion of Judge Baxter in the Hays case has been often quoted. He said that "a discrimination in favor of parties furnishing the largest quantity of freight, and solely on that ground, is a discrimination in favor of capital and is contrary to a sound public policy, violative of that equality of right guaranteed to every citizen, and a wrong to the disfavored party for which the courts are competent to give redress." A large discrimination

in rates in favor of shippers shipping over 100,000 tons of coal per annum was held invalid by Mr. Justice Brewer in *Burlington, Cedar Rapids & Northern R. R. Co.* v. *Northwestern Fuel Co.*, 31 Fed. Rep., 652. In the Bristol case, 5 C. B. N. S., 309, it was held illegal to make special rates in consideration of engagements to furnish a large amount of business over other lines of the same railroad. The Providence Coal Company case (1 Int. C. C. 107), to the same effect, received the approbation of the thinking community. Thus Prof. A. T. Hadley, the leading American authority on the economics of transportation, said in commenting upon this decision that it "struck directly at some of the worst abuses in American railroad management * * * . The railroads might make lower rates for carloads than for parcels; this was a necessity of railroad economy. But in dealing with larger quantities * * * their obligation to treat their customers equally could not be set aside on the ground of any economy in dealing with one man rather than several * * * . The real ground for so much well founded complaint is that railroads have made reductions for one man and not for another, producing an inequality whose benefit to the company is but trifling, while its advantage or injury to the respective classes of shippers is enormous" (2 Quart. Journ. Econ., 171, 181).

(*b*) Agreements for exclusive patronage or threats to withdraw patronage or build rival lines are insufficient grounds for discrimination. Agreements by other carriers for exclusive patronage have been held good at common law under certain restrictions; but a railroad

cannot thus take a freight contract out of the Equality Clause. (*Harris* v. *Cockermouth & Workington Ry. Co.*, 3 C. B. N. S., 693.) For allowing reduced rates to the Standard Oil Company on account of threats of that company to withdraw its business, a receiver was removed (*Handy* v. *Cleveland & Marietta R. R. Co.*, 31 Fed. Rep., 689), Judge Baxter holding the contract to be void at common law, and saying (pp. 692-3): "But this franchise carried with it other and corelative obligations. Among these is the obligation to carry for every person offering business under like circumstances at the same rate. * * * If it were not so, the managers of railways, in collusion with others in command of large capital, could control the business of the country, at least to the extent that the business was dependent on railroad transportation for its success, and make and unmake the fortunes of men at will. The idea is justly abhorrent to all fair minds. No such dangerous power can be tolerated. Except in the mode of using them, every citizen has the same right to demand the service of railroads on equal terms that they have to the use of a public highway or the government mails."

(*c*) Nor can a railroad discriminate between individuals as a punitory measure. (*Atwater* v. *Delaware, Lackawanna & Western R. R. Co.*, 48 N. J. Law, 55.)

(*d*) Nor can it discriminate for the purpose of building up industries along its line, by giving special rates to persons who undertake to develop them. (Denaby case, *supra*; *Ransome* v. *Eastern Counties Ry. Co.*, 1 C. B. N. S.,

437; *Oxlade* v. *North Eastern Ry. Co.*, *id.*, 454.) The Pennsylvania Supreme Court has recently sustained a discrimination, made with this alleged purpose, between persons who import for their own use and those who import for sale (*Hoover* v. *Pennsylvania R. R. Co.*, 156 Pa. St., 220); but the test of intent is a very dangerous one, as is often found in administering the customs revenue laws; the reasoning of the court is of doubtful soundness economically; and the case has been subjected to severe criticism. (See 28 Am. Law Review, 139; and compare the "packed parcels" cases *supra*.)

(*c*) According to the weight of reason and authority, rebates cannot be given in consideration of special advantages granted to the railroad. In the Goodridge case, 149 U. S., this court refused to recognize a contract of the kind which was clearly only a colorable one, but withheld its opinion upon the general question. Such contracts were sustained at common law in *Root* v. *Long Island R. R. Co.*, 114 N. Y., 300, and in *Johnson* v. *Pensacola & Perdido R. R. Co.*, 16 Fla., 623; but they are contrary to the plain terms of the Equality Clause, and it would be impossible to attain equality between shippers if such arrangements were permitted. The value of a lease, a right of way, an agreement to furnish supplies as needed, or even of a given quantity of goods sold, cannot be accurately expressed in an agreement to give special rates for all goods shipped during a definite or an indefinite future time; although, of course, a liquidated debt owed by a railroad may be paid by giving either rebates or free carriage until it is cancelled.

In the Harris case, *supra*, 3 C. B. N. S., 693, 712, it was held that no preference could be given to colliers in consideration of connecting their mines with the railroad by tramways at a large expense. Otherwise, as Lord Chief Justice Cockburn said, "every man would be making his own bargain." Mr. Justice Williams said (p. 714): "That to hold otherwise would be to introduce a principle whereby a railway company might give a preference in every case where they *bona fide* considered it would be to their advantage to do so."

IV.

The act is constitutional.

Defendants' counsel argue that the second section of the Interstate Commerce Act is unconstitutional and void in its criminal aspect unless construed in such a way as practically to nullify it. It is claimed to be void as being too indefinite and uncertain; and *Tozer* v. *United States*, 52 Fed. Rep., 917, is relied upon.

This case was a prosecution under the third section of the act. Defendant was charged with giving an "unreasonable preference." Judge Thayer sustained the verdict (39 Fed. Rep., 904, 908–9), but Mr. Justice Brewer and Judge Caldwell on appeal reversed it (52 Fed. Rep., 917). Mr. Justice Brewer said (p. 919): "But in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act can not depend upon whether a jury may think it reasonable or unreasonable. There

must be some definiteness and certainty;" and quoted from some remarks of his own in *Railway Co.* v. *Dey* (35 Fed. Rep., 866, 876) to the same effect, saying that the law is equivalent to that passage of the Chinese Penal Code which reads as follows: "Whoever is guilty of improper conduct, and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished with at least 40 blows; and when the impropriety is of a serious nature, with 80 blows." The latter quotation was repeated by the learned justice in his dissenting opinion in *Interstate Commerce Commission* v. *Brimson*, 155 U. S., at p. 6.

If the constitutionality of the penal provisions relating to undue preferences were relevant to the present case, then the undersigned respectfully urges that they should be sustained. It will be noticed that upon conviction for an offence against the third section, the sentence can be only for "a fine of not to exceed $5,000 for each offense." No other authority has been found holding that either court or jury may not grant a pecuniary judgment when the charge against the defendant is one of undue or unreasonable action. Reasonableness of time is often an important element in a case. Any reason applicable to merely pecuniary penalties would be applicable as well to the doctrine of punitory damages in actions for tort. It is true that a poor person unable to pay the amount of the penalty is liable to thirty days' detention (Rev. St., § 1042); but at common law he was liable to imprisonment for debt in all cases, without violating any constitutional provisions. The mere fact that

the proceeding is called a prosecution for a misdemeanor, instead of being called an action for a penalty, would seem to be immaterial. The sole authority cited is *Ex parte Jackson*, 45 Ark., 158, 164. That case arose under a statute making it a misdemeanor to "commit any act injurious to the public health or public morals or to the perversion or obstruction of public justice or the due administration of the laws." The relator was convicted for "committing an act injurious to public morals, by leaving his wife and child without the means of support, and living openly and publicly with one Dolly Hare." He seems to have been sentenced to a term of imprisonment, and the law was held to be void as an *ex post facto* law, since it made the act "a crime or not according to the moral sentiment which might happen to prevail with the judge and jury after the act had been committed." But why should it be unconstitutional to provide a mere pecuniary fine for unreasonable action, when that action can without doubt be prohibited by a writ of injunction, possibly involving a much greater loss to the defendant?

This prosecution is not under the third section, and therefore not affected by the reasoning in the Tozer case. The second section, construed as was its English progenitor, and as we have contended that it should be, affords as clear a test of a criminal act as do many other penal statutes. The question of similarity is indeed one of fact; but it is one which is submitted to the jury in cases of counterfeiting, and analogies could doubtless be found in many other criminal proceedings. Construed reasonably, there is no more uncertainty in this provision

than there is in the familiar requirement that testimony which is made the basis of a prosecution for perjury must be material. Statutes against indecent publications have been frequently enforced and never questioned; yet they involve an exercise of judgment on the part of the court or jury, whichever may be the deciding authority, which is upon lines quite as broad as those marked out by the provisions of the Interstate Commerce Act.

But the framers of the amendatory act of 1889 seem to have had the distinction above discussed in mind; and for that reason to have imposed merely a fine for violations of the third, fourth and fifth sections of the act, while they provided the additional punishment of imprisonment in the penitentiary for violations of the second section.

And this distinction tends to show that the Congress of 1889, which put the Interstate Commerce Act into its present form, regarded the second section as properly bearing the construction which the English courts had given to the Equality Clause from which it was derived—the construction for which the undersigned has argued in the foregoing brief.

V.

It does not seem necessary to discuss the assignments of error separately. Nearly all come down to the same claim: namely, that the difference between the situations of Bruening and Wolf in respect to the Pan Handle road constituted a substantially dissimilar circumstance or condition. If the foregoing argument is correct, the

rulings of the court in its instructions to the jury and in denying requests for instructions are unassailable. The charge is substantially the same as that of Martin, B., in the Sutton case, and the rulings in the Evershed case; namely, that the jury shall consider whether the circumstances are similar, but that Bruening's siding on the Pan Handle road can not be regarded as introducing an element of dissimilarity.

Technical objections are made to the indictment on the ground that the name of Henry Wolf is mentioned instead of the Kaufman Brewing Company, which is claimed to have been the person for whom the transportation services were rendered by the defendant's railroad. The allegation is that the railroad charged less to Bruening "than was charged to, demanded, collected and received from Henry Wolf, for doing for him a like and contemporaneous service" (p. 3). Wolf actually made the payments and got the beer (p. 69). The point does not seem to require elaboration. (*Cochran* v. *United States*, 157 U. S., 286, 290, & cas. cit.)

It is respectfully submitted that the judgment should be affirmed.

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